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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906

No. ~~367~~. 96.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

A. J. LYON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED AUGUST 5, 1905.

(19,869.)

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GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

A. J. LYON, Appellee.

Transcript on Appeal.

4 No. 857.

In the Supreme Court of the Territory of Arizona.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

A. J. LYON, Appellee.

Abstract of Record.

Frank W. Burnett, Attorney for Appellant.
Falvey & Davis, and Geo. R. Hill, Attorneys for Appellee.

Filed April 18th, 1904.

S. M. CULLOM, *Clerk,*
By ANGIE B. PARKER,
Deputy Clerk.

5 In the Supreme Court of the Territory of Arizona.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

A. J. LYON, Appellee.

Transcript of Record and Abstract of Evidence.

Complaint.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Gila.

A. J. LYON

vs.

GILA VALLEY, GLOBE & NORTHERN R. R. Co.

To the Hon. Judge of said Court:

Now comes plaintiff by her attorneys and with notice, leave of the court and after service of copy hereof, amends her original complaint heretofore filed herein July 1st, 1901, and for amendment, says:

6

Your petitioner, A. J. Lyon, hereinafter styled plaintiff, complaining of the Gila Valley, Globe & Northern Railroad Company, hereinafter styled defendant, for cause of action respectfully shows to the court:

That plaintiff resides in the county of El Paso, state of Texas; that defendant is a railroad company, and is a corporation duly organized, engaged in doing business in said Gila County, and has an agent in the town of Globe, in said county, to-wit: A. M. Beal, who is the agent and superintendent of defendant, upon whom service may be had in said town, county and territory. That plaintiff is a *femme sole* the mother of H. N. Lyon, and was at the time of the death of H. N. Lyon the only surviving parent of said H. N. Lyon, deceased. That heretofore, to-wit: on or about the 14th day of July, A. D. 1900, said H. N. Lyon, deceased, received injuries causing his death as is hereinafter more particularly shown; that said Lyon, deceased, was at the time of his death unmarried and without issue.

That on or about the said 14th day of July, 1900, defendant was engaged in the business of operating a railroad in said county of
Gila and territory of Arizona, having its track road, right
7 of way and line running from Bowie, in the county of
Cochise, northerly through the county of Graham, and to the town of Globe in said county of Gila, territory of Arizona, and defendant was then and there engaged in the business and occupation of operating trains and cars over said road and track and carrying freight and passengers for hire, etc.; that on and prior to the date last aforesaid, defendant used in the operation of its railway a certain track and roadway, or spur, in said town of Globe, which, on account of the faulty and negligent manner of its construction and maintenance was an unsafe place in which defendant's employés were required to work, which fact was known to defendant, or could have been known to it by proper inspection, and was unknown to said H. N. Lyon, making the duties of the defendant's brakemen and other employés engaged in the operation of defendant's cars over said track or spur extra hazardous, and dangerous, in this, to-wit: that there is constructed over said track and said trestle a certain house or shed through which and under which the cars of defendant were operated on and prior to said date; that said house or shed was then and there so low that employés riding upon the top of defendant's cars could not stand erect, but were compelled to
stoop or lie down in order to clear said house or shed, so that
8 when cars were pushed through or beneath said house or shed
along said track and trestle, the brakemen and employés in charge of such cars could not safely use the hand brakes thereon to control the speed of such cars, and could not attempt to stop such cars until the same had passed from within said house or out from under said shed; that from said house to the end of said trestle or spur a space of one hundred and five feet, more or less, intervened, so that when cars of defendant were run along said track, through or under said house or shed, at ordinary speed, it was difficult to stop the same before such cars would reach the end of said spur;

that said trestle and spur — at the verge of a canyon or ravine, the bottom of which canyon or ravine is thirty feet, more or less, below said track, so that the danger to such cars and their employés in case such cars should pass beyond the end of said track and trestle, was very great, so that some effective means should have been adopted to prevent cars from running over and beyond the end of said spur, and falling into said canyon; that at the end of said track or spur no safe and sufficient buffer or bulkhead to keep such cars from falling into said canyon was used and maintained by defendant, which fact was known to defendant or could have been known to it by proper inspection, and was unknown to said H. N.
9 Lyon; that instead of a good and sufficient buffer or bulkhead of sufficient size and strength against which the drawbar, car buffer or wheels might strike and prevent cars from passing beyond the same, that to try and prevent said cars from passing over the end of said trestle and into said canyon defendant had and maintained a piece of timber eight to twelve inches in thickness fixed across the rails at the end of said track, so that the wheels of such cars might come in contact therewith, which timber was insufficient and unsafe for the purpose of accomplishing said object; first, in that the same was insecurely fastened upon the rails by means of bolts passed through the same so that only half the strength of said timber would be opposed to the strain or shock on being struck by the cars; second that said timber was not of sufficient strength to sustain the shock of a car or train of cars, and stop the same, and the weight of such cars would carry the same off the end of said track; third, that said timber was so low that the wheels of such cars would jump upon the same and pass over said timber, permitting such cars to fall into said canyon.

That owing to the position of said house over said track and spur, and owing to the height of the same, and also owing to the short space that intervened between said house and the end of said
10 trestle, whereby and in consequence of both of said causes the control of such cars and the stopping thereof was rendered difficult, it was dangerous and extra hazardous to leave the end of said track unprotected, or with so slight a protection as was afforded by said timber across said rails, and by reason of all of said defects, it was dangerous and extra hazardous to operate its said trains and cars over said portion of said track; that on the date last aforesaid, said H. N. Lyon, deceased, was a brakeman in the employment of defendant, and was engaged in his duties at said time and at said dangerous place, in assisting and putting upon said trestle between said house or shed and the end of said spur, two cars of defendant, that said cars were pushed through said house or under said shed along said track; that after said cars passed through said house and under said shed it became necessary and proper for said Lyon, deceased, to use the hand brakes upon said cars to stop the same upon said trestle, but by reason of said low shed or said portion of said house being so near the tops of said cars, he was unable to use said hand brakes until the same or the car upon which he was working had passed beyond said house; that owing to the short distance from

said house to the end of said spur, said Lyon, deceased, though he immediately attempted to put on the brake, was unable to
11 do so in time to prevent his car coming in contact with the timber across said rails at the end of said trestle; that though he used all due and proper care and caution to stop said car before the same struck said timber, said car nevertheless ran against said timber, which timber, on account of its insufficient strength and fastening and on account of its insufficient height*h*, permitted said car to knock the same from its hold, and permitted the wheels of said car to climb upon the same, and pass beyond the end of said trestle, precipitating said car to the bottom of said canyon, whereby said H. N. Lyon, deceased, was thrown many feet into the air, falling also in the bottom of said canyon, whereby and by reason of said fall and concussion, said H. N. Lyon received injuries which shortly thereafter resulted in his death.

Plaintiff says that the defendant was negligent in causing its trains to be operated over said track at said place in view of the conditions and circumstances aforesaid, and that defendant was also negligent in constructing or permitting to be constructed said house or shed over said track in such a way that the hand brakes might not be used by defendant's employés in charge of its cars, and in constructing or permitting to be constructed said trestle or spur, after said track passed through or out of said house, so short as
12 not to enable its employés to use the hand brakes upon the said cars effectively, and not to be able to stop the same upon said trestle before such cars might come in contact with said obstruction at the end of said trestle and track, and was negligent in constructing or permitting to be constructed said beam or timber of such insufficient height and of such insufficient strength and so insufficiently secured that the same would not keep the said cars from passing beyond said trestle and falling into said canyon; that at the time the said Lyon was killed, he had been working for the defendant and upon defendant's line and the tracks used by defendant for only a short time, to-wit: for the space of about ten days and that the said Lyon, deceased, did not know the dangers of said spur, trestle, buffer, house, and location where said accident occurred, and was in no way guilty of any negligence or fault in remaining in the employ of defendant or in the performance of his duties at and prior to the time of the accident, contributing to said injury.

Plaintiff further says that at the time of the occurrence resulting in the death of said H. N. Lyon, said Lyon, deceased, was of the age of 30 years, and that plaintiff was of the age of 53 years, that the plaintiff depended upon the said Lyon, deceased, for her support and maintenance and that said Lyon was then and had been for
13 many years, and would have continued to be able to earn the sum of seventy-five dollars per month, which sum, said Lyon, deceased, had contributed each month toward the support and maintenance of plaintiff, and that had said Lyon, deceased, lived, he would have continued to support plaintiff for the rest of her life; that by reason of the death of the said Lyon, plaintiff has been deprived of the benefits formerly received from said Lyon, deceased,

and of the support and maintenance contributed by him, and which he would have continued to contribute so long as plaintiff lived, that such support and maintenance which would have been contributed by said Lyon, deceased, is of the value of twenty-five thousand dollars.

Wherefore, plaintiff says she has been damaged through the negligence of defendant, as aforesaid, in the sum of twenty-five thousand dollars, for which sum she sues herein. The defendant being in court, premises considered, plaintiff prays that upon hearing hereof, she have judgment against defendant for said sum of twenty-five thousand dollars, together with costs of suit and general relief, for which she will ever pray, etc.

FALVEY & DAVIS AND
GEO. R. HILL,
Attorneys for Plaintiff.

14 Endorsed: "Filed June 16, 1902. Charles T. Martin, Clerk."

[Title of Court and Cause.]

Amended Answer of Defendant to the Complaint.

Comes now the said defendant answering the complaint, and for amended answer thereto, says:

Said defendant denies each and every allegation contained in said complaint, except that defendant is a duly organized corporation owning and operating a railroad, as alleged in said complaint.

For a further and separate answer to said complaint defendant denies that the said track, roadway and spur described in said amended complaint as being the place where said deceased was killed was constructed or maintained in a faulty or negligent manner, and denies that it was an unsafe place in which defendant's employés were required to work. On the contrary, defendant alleges that its road track, spur and trestle were constructed in a safe manner, and were reasonably safe for the use they were intended, and for which they were used. Said track and spur and appliances described in said complaint were not constructed for the purpose of switching cars in the manner in which it was done on the occasion of the injury to the deceased. Said appliances were con-
15 structed and were intended to be used for the purpose of stationing cars thereon to be loaded or unloaded at the mines or works of the United Globe Copper Company by means of being pushed thereon by a locomotive engine connected with said cars by airbrakes operated by said engine; that it was wholly impracticable to handle heavily loaded cars by means of the hand-brakes, and it was never intended or supposed that hand-brakes were to be relied upon to hold the cars deposited upon the said spur, but so long as the said cars remained attached to the train and connected to the train by air-brakes it was perfectly safe and practicable to

situate cars upon said spur, and use and operate said appliances with reasonable safety to said employés.

And defendant further alleges that it had always been the custom, prior to the accident in question, to operate the cars at the point in question by means of said air-brakes, but that on the occasion of said injury the person in charge of said train, to-wit: the conductor thereof, who was a fellow servant of said deceased in the operation of said train, and one of the crew engaged with the deceased in the operation thereof, carelessly, recklessly and without the authority, direction or consent of said defendant, or knowledge by it,
16 caused two cars, upon one of which the defendant was stationed, to be cut loose from the remainder of the train and shoved with great force onto the spur, thereby causing the injury described in said complaint, which otherwise would not have happened.

And defendant further alleges that said deceased had had sufficient opportunity, prior to said injury, to observe the nature and character of the tract and appliances in question, and after knowledge thereof, or opportunity to know thereof, had elected to continue in such employment, and thereby assumed the ordinary risk and peril thereof.

Defendant further alleges that said injury complained of was not caused by its neglect in the respect charged, or in any respect, but was due to the negligence of H. M. Lyon, deceased, or to the negligence of his fellow servants or servants acting with him in the operation of said train, or by the concurring negligence of the said deceased and his fellow servants, or some of them.

Defendant further alleges that the premises described in the complaint, and where the said accident happened, are upon the property of the United Globe Mining Company, and said track and spur were constructed to supply the business of said mining company alone; that the shed described is the property of the said mining
17 company, over which defendant has no control, and which it has no power to alter or remove.

Wherefore, the defendant having fully answered, prays hence to be dismissed, with its costs in this behalf unjustly sustained.

FRANK W. BURNETT,
Attorney for Defendant.

[Title of Court and Cause.]

Amended Reply to Defendant's Amended Answer.

Now comes the plaintiff in the above styled and numbered cause and with notice and leave of the court files this her first amended reply to defendant's amended answer filed herein on the 10th day of December, 1901, and for amendment says:

First: Defendant excepts to the sixth paragraph of said answer, and says that the same is insufficient in this, to-wit: That defendant therein alleges that the injury complained of was due to the negligence of H. N. Lyon, deceased, or to the negligence of his fellow servants, or servants acting with him in the operation of said

train, or by the concurring negligence of the said deceased and his fellow servants or some of them, without alleging any facts showing wherein said deceased was guilty of con-
18 tributory negligence or wherein the fellow servants of said deceased were guilty of negligence in the operation of said train, or wherein the concurring negligence of said deceased, his fellow servants, or some of them resulted in said injury. That said allegations are too vague, indefinite and general to apprise this plaintiff of the evidence intended to be offered by defendant to substantiate the same, or to enable plaintiff to produce testimony to rebut the evidence offered thereunder by defendant.

Wherefore the plaintiff prays the sufficiency of said allegation and asks that defendant be required to plead the facts with reference to said allegations, the same being a conclusion deducible from facts rather than the pleadings of facts in defense of plaintiff's cause of action, and of this plaintiff prays the judgment of the court.

FALVEY & DAVIS,
GEO. R. HILL,
Attorneys for Plaintiff.

Second: Replying herein to the amended answer of said defendant, and especially to the fifth paragraph thereof, wherein defendant alleges that deceased had sufficient opportunity, prior to said injury, to observe the nature and character of the track and appliances in question, and after knowledge thereof, or opportunity to know thereof, had elected to continue in such employment, and had thereby assumed the ordinary risk and peril thereof,
19 says: that the deceased H. N. Lyon, was at the time of the happening of said accident inexperienced in the operation of trains and that he did not know of the dangers threatened by, or incident to the condition of the premises, and was not charged with assuming the risk incident thereto, and was not negligent in continuing in the service of defendant; that prior to the time that deceased had entered the services of defendant he had not been engaged in the business of operating railway trains, that he had never before engaged in the employment of brakemen, engineer, fireman, conductor, switchman, or in any branch of the service so as to become familiar with the duties of said service, or to know of the dangers incident to the operation of trains and cars at the place where the accident occurred; that at the time of the happening of the said accident deceased had recently been employed by defendant in the capacity of brakeman or switchman, in which capacity he had been working for only ten days, or two weeks, more or less, prior to the time of his death, and that he had at that time not become so familiar with the premises, or become aware of the dangers invited by the said condition as to be charged with contributory negligence by remaining in the service, or asuming the risk incident to the service with respect to the said premises.

20 That further replying to said amended answer, and more especially that part of the same wherein defendant seeks to avoid a recovery herein on the ground that deceased's injury and

death resulted through the negligence of defendant's conductor, and deceased's fellow servants, plaintiff says: that if the conductor or other fellow servants of deceased were guilty of any negligence, which is not admitted but denied, that the defendant herein was also guilty of negligence which contributed to and caused said accident. That had it not been for the contributive negligence of said defendant, with reference to the said unsafe place and insecure and insufficient structures and appliances as complained of in plaintiff's complaint —.

And further replying to said answer and especially to the last paragraph thereof, in which defendant seeks to avoid responsibility, in said action, on the ground that the premises where the accident occurred was the property of the United Globe Mining Company, and that defendant had no control over the same, plaintiff says: that if said premises, spurs and structures were not the property of this defendant, and this defendant had no control thereover, which is not admitted, but denied, that defendant was nevertheless guilty of negligence in operating its trains over said spur and in said dangerous place and was negligent in requiring its employés
21 to work therein, and that defendant was responsible for the condition of the said premises and should have required the same to have been safely constructed and maintained before operating its trains therein and requiring its employés to enter said dangerous place and subject themselves to the risks and dangers incident thereto, all of which plaintiff is ready to verify.

Premises considered, plaintiff prays judgment in her original complaint filed herein.

FALVEY & DAVIS,
GEO. R. HILL,
Attorneys for Plaintiff.

[Title of Court and Cause.]

Judgment.

Be it remembered that on the eleventh day of December, A. D. 1903, the above styled and numbered cause being called for trial, thereupon came the parties thereto, both plaintiff and defendant, by their respective attorneys and announced ready for trial; and thereupon came a jury of good and lawful men, qualified jurors, to-wit: Leroy Middleton, and eleven others, who after being duly selected, empaneled and sworn to try the issues joined between the parties, and who, after hearing the pleadings read, the evidence introduced by both parties, the charge submitted to them by the court,
22 and the arguments of counsel (the proceedings and hearing of said cause having been proceeded with from day to day, until, to-wit: the twelfth day of December, A. D. 1903) retired in the custody of the officer of the court, to consider of their verdict, and thereafter, on the fourteenth day of December, A. D. 1903, said jury returned into court the following verdict, to-wit:

No. 744.

"A. J. LYON, Pl'ff,
vs.
GILA VALLEY, GLOBE AND NORTHERN RAILWAY CO., Def't.

Verdict.

We, the jury, duly empanelled and sworn in the above entitled action, upon our oaths do find for the plaintiff, and assess her damages at $5000.00 five thousand dollars.

LEROY MIDDLETON, *Foreman.*"

And the court having received said verdict, then and there directed the clerk to read the same, whereupon the said verdict was read by the said clerk in the presence of said jury, whereupon the court inquired of the jury if such was their verdict and the said jury thereupon responded that it was.

It is therefore considered by the court that said verdict be accepted by the court, and that plaintiff recover of defendant as therein found by said jury.

Wherefore, it is considered, ordered, adjudged and decreed by the court, that plaintiff, A. J. Lyon, doth have and recover of
23 and from the defendant, The Gila Valley Globe and Northern Railway Company the sum of five thousand dollars, and that plaintiff doth have and recover of and from defendant The Gila Valley Globe and Northern Railway Company, all her costs in this behalf expended, to-wit the sum of $69.80, for all of which let execution issue.

Done in open court this 14th day of December, A. D. 1903.

EDWARD KENT,
Judge of the District Court.

"Filed December 14, 1903."

[Title of Court and Cause.]

Minutes of the Court.

A jury is demanded and it is by the court ordered that this cause be and the same is hereby set for trial on Friday, Dec. 11th, 1903.

FRIDAY, *December* 11, 1903.

On motion of F. W. Burnett, Esq., attorney for defendant, it is ordered that L. F. Eggers, Esq., be entered as of counsel for defendant.

Comes now Waters Davis, Esq., att'y for pl'ff, and moves the court to withdraw certain portions of plaintiff's reply, which is granted.

Comes now F. W. Burnett, Esq., att'y for def't and moves that certain other portions of plaintiff's reply be stricken out, which is by the court denied.

24 This cause coming on regularly for trial, plaintiff appearing in person and by counsel Waters Davis, Esq., and Geo.

R. Hill, Esq., defendant corporation appearing by its counsel, F. W. Burnett, Esq., and L. F. Eggers, Esq., by order of the court, the following named persons duly summoned according to law, were drawn by the clerk, called into the jury box, and sworn as their qualifications to serve as trial jurors herein, viz:

R. M. Odle, Ed. Howell, J. Warren Young, W. T. Armstrong, F. M. Allen, C. E. Finley, W. S. Sultan, E. A. Baumgardner, A. E. Arman, David Glenn, H. Coffee, Wm. Brunson, Winthrop House, T. Bray, S. H. van Slyck, Herman A. Sidow, E. F. Kellner, Jr., E. P. Shanley, W. H. Childress, J. W. Brown, Robert Stead, R. M. Coffee, Leroy Middleton, T. F. McCann, J. D. F. Beard, Robert Sloan, H. E. Fox, John Solomon, Geo. E. Shute, W. G. Shanley, and C. P. Breitenstein, and thereupon Ed. Howell, J. Warren Young, C. E. Finley, W. S. Sultan, David Glenn, S. H. van Slyck, Robert Stead, Robert Sloan, H. E. Fox, John Solomon and W. G. Shanley were challenged for cause and by the court excused.

The panel being now complete the clerk prepared a jury list and handed the same to plaintiff, who, after exercising her peremptory challenges returned the same to the clerk, the clerk then
25 handed said list to defendant's counsel who, after exercising the peremptory challenges on behalf of defendant corporation, returned said list to the clerk, who thereupon called the first twelve names remaining unchallenged on said list, viz:

1. R. L. Odle
2. W. T. Armstrong
3. F. M. Allen
4. E. A. Baumgardner
5. A. E. Arman
6. Wm. Brunson
7. T. Bray
8. Herman A. Sidow
9. E. F. Kellner, Jr.
10. W. H. Childress
11. Leroy Middleton
12. J. D. F. Beard

who were sworn to try the cause.

Plaintiff then read to the jury the amended complaint herein and made *his* statement;

Defendant then read the answer and made *his* statement to the jury;

Plaintiff read *his* reply and made a further statement and then called David Glenn, and A. M. Beal, who were sworn, examined and cross-examined as witnesses for the plaintiff; plaintiff then read the testimony of W. A. Golder and M. F. O'Connor, taken at a former trial of this cause; A. W. Sydnor was called, sworn, examined and cross-examined as a witness for plaintiff; plaintiff then read the deposition of James Hartigan, after which it is by the court ordered that the further trial of this cause be continued to 9 o'clock a. m., Dec. 12, 1903, the jury was, after being instructed by the court not to talk among themselves and not to permit any
26 one else to talk to them or in their presence on any subject connected with this trial, excused to 9 o'clock a. m., Dec. 12, 1903.

SATURDAY, *December* 12, 1903.

Plaintiff in person and by counsel, and defendant by its counsel being present, the roll of the jury was called and all answered to

their names, and the trial of this cause was resumed before the court and jury.

Plaintiff then offered further documentary evidence and T. S. Brooks and Mrs. A. J. Lyon were called, sworn, examined and cross-examined as witnesses for the plaintiff, whereupon plaintiff rests.

Defendant then offered the depositions of Epes Randolph, Arthur G. Wells, and E. L. Swain. Wm. Garland and A. M. Beal were called, sworn, examined and cross-examined as witnesses for the defendant, the testimony of R. S. Maclay taken at a former trial of this cause was then read. S. T. Arkills was then called, sworn, examined and cross-examined—the testimony of B. Jones and the deposition of Bruce Tyler were then read, whereupon defendant rests.

Plaintiff, in rebuttal, called Andre Maurel and Geo. R. Hill, who were sworn, examined and cross-examined, whereupon both parties rest.

27 After listening to the charge and instructions of the court and the opening arguments of Geo. R. Hill, Esq., for plaintiff, and L. F. Eggers, Esq., for defendant, it is by the court ordered that this cause be now suspended to 7 o'clock p. m. of this day, and the jury was after being instructed by the court not to talk among themselves and not to permit any one else to talk to them or in their presence on any subject connected with the trial of this cause, excused to 7 o'clock p. m. of this day, and court stood at recess to 7 o'clock p. m., after recess court resumed its session, plaintiff being present in person and by counsel, and defendant's counsel being present the roll of the jury was called and all answered to their names, the concluding arguments were then made by F. W. Burnett, Esq., for defendant and Waters Davis, Esq., for plaintiff, whereupon the jury was placed in charge of John Heuck and Sam Traut, sworn officers of the court, and retired to consider of their verdict, with the instruction of the court, that if they should agree on a verdict to have the same signed by their foreman, seal it up in an envelope, leave the same in charge of their foreman, and report promptly at 9 o'clock a. m., Monday, December 14th, 1903.

MONDAY, *December* 14, 1903.

The jury in the above entitled cause came into court and the roll being called all answered to their names, pl'ff and def't being rep-

28 resented by counsel, the clerk asked the jury "Gentlemen, have you agreed upon a verdict-" the jury replied in the affirmative and presented to the court their verdict, which was ordered entered, viz:

"A. J. Lyon, plaintiff, No. 744, *vs.* Gila Valley, Globe and Northern Railway Co., def't.

Verdict.

We, the jury duly empanelled and sworn in the above entitled action, upon our oaths do find for the plaintiff and assess her damages at $5000.00 five thousand dollars.

LEROY MIDDLETON, *Foreman.*"

Said verdict was read to the jury and they were asked if this was their verdict and the jury replied that it was, and thereupon said verdict was filed and recorded, and the jury was discharged from further consideration of the cause; and it is further ordered that judgment in favor of plaintiff A. J. Lyon, and against the Gila Valley, Globe and Northern Railway Co., defendant herein, be entered in accordance with the verdict of the jury, which is done.

Comes now defendant, by its counsel and files a motion for a new trial, which is argued by the respective counsel and submitted to the court, whereupon the court denies the motion for new trial, to which ruling of the court defendant excepts, and defendant then gives notice in open court of appeal to the Supreme Court of
29 Arizona Territory from the order overruling the motion for a new trial and from the judgment, which appeal is allowed.

The bond on appeal was then fixed at $12,000.00, and it is ordered that defendant have twenty days' stay of execution, and ninety days from date hereof for the filing of a bill of exceptions and assignment of errors, and the reporter was allowed sixty days in which to extend his notes.

EDWARD KENT, *Judge*

[Title of Court and Cause.]

Appeal Bond.

Know all men by these presents, that we, the Gila Valley, Globe & Northern Railway Company, a corporation, the defendant in the above entitled action, as principal, and J. N. Porter and Geo. W. P. Hunt, as sureties, are held and firmly bound unto A. J. Lyon, the plaintiff in the above entitled action, in the sum of twelve thousand dollars ($12,000), lawful money of the United States of America, to be paid to the said A. J. Lyon or her legal representatives, to which payment well and truly to be made, we bind ourselves jointly and severally, and our several heirs, executors, administrators and assigns firmly by these presents.

Sealed with our seals and dates this 14th day of December, A. D. 1903.

30 The conditions of the above obligation are such that, whereas, the said plaintiff did on the 14th day of December, A. D. 1903, recover a judgment in the above entitled action in said court against said defendant, which judgment was duly made and entered by said court on said day in and for the sum of five thousand dollars ($5,000), together with the costs of said suit, and whereas the defendant has appealed to the Supreme Court of the Territory of Arizona from said judgment and from an order denying a motion for a new trial of said action, also entered upon said day, and desires to stay the execution of said judgment pending the hearing of said appeal; now, if the defendant will prosecute the said appeal with effect, and in case the judgment of the appellate court is against the appellant, the said appellant shall perform its judgment, sentence or decree and pay all such damages as may be

awarded against it on said appeal, then this obligation to be void, otherwise to remain in full force and effect.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY,
By WM. GARLAND,
Per A. M. B. *President.*

J. N. PORTER,
Signed for 12000 *Thousand* Dollars.
GEO. W. P. HUNT,
Signed for 12,000 *Thousand* Dollars.

31 TERRITORY OF ARIZONA, *County of Gila, ss:*

J. N. Porter and Geo. W. P. Hunt, on this 14th day of December, A. D. 1903, being duly sworn, on oath depose and say, each for himself, that he is worth the amount for which he has signed as surety on the foregoing appeal bond, over and above his just debts and liabilities, exclusive of property exempt from execution, and each doth depose and say and acknowledge each for himself, and not one for the other, that he signed the same freely and voluntarily.

J. N. PORTER.
GEO. W. P. HUNT.

Subscribed and sworn to before me this 14th day of December, A. D. 1903.

(Dist. Court Seal.) CHAS. T. MARTIN,
Clerk Dist. Court, Gila County, A. T.

"Filed and approved this 14th day of December, 1903."

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered, that upon the trial of the above entitled action the following proceedings took place:

Upon the case being called for trial, the defendant moved the court to strike out of the pleadings called "Plaintiff's reply" all of the paragraph beginning with the word "second."

32 The court overruled said motion, to which ruling the defendant at the time excepted.

Thereupon a jury was empannelled and sworn, and the pleadings read to them, including the paragraph above mentioned.

Thereupon to maintain the issues on her part, the plaintiff introduced testimony as follows:

DAVID GLENN.

[Tr. 56.] Remember the accident of July 14, 1900, when Mrs. Lyon's son was killed. I was running the tramway at the smelter. I was at the time in the tramway house, built over the railway track,

where the buckets come in and turn back up to the mine. The railroad track runs through and under it (the tramway house). [Tr. 57.] I was over the R. R. track. There is quite an opening in the center, probably 20 or 30 feet square, through which you can look down. The first I heard was the cars coming up, drew our attention. Knew they were coming pretty fast. I looked, and the cars passed through. I looked [Tr. 58] through this opening. Two cars passed through. Mr. Lyons was on the first car, and Mr. Rings, the conductor, was on the second car. I heard it when it went through. I knew what it meant, the speed they were going. I ran to the front of the opening where the buckets enter, and stopped the tramway; then I looked around the corner to see what would
33 occur—to see the cars go over. Saw the car go over the end of the trestle. Mr. Lyons was on it [Tr. 59]. The first I saw him he started back onto the second car; started toward the second car, when Riggs, as near as I could hear, damned him to go back to his brake. Then he turned and went back and went down. The last I saw him alive, he was about midway of the car, with his hands up and the club he sets the brakes with in his left hand, hanging to the car. Then I ran down; as the last of the car went over, it broke three or four feet off each rail that projected over past the trestle—the car went down on its end into a pile of iron ore some distance below, and then over and threw him. I ran down into the canyon. Found him dead [Tr. 60]. The car fell among a lot of boulders. From the top of the car to the bottom of the canyon, I should judge was 75 feet. The track to the smelter leaves the main line I should judge 500 yards, probably more. After leaving the main line [Tr. 61] it isn't much grade for some little distance, then it is quite a steep up grade from there on up—for about half of the distance. It starts off on level and gets steeper and steeper until it ends up under the tramway. The grade ceases when it strikes the house. From there it is level. Think there is room for four cars on the level grade [Tr. 62]. Think there was
34 about two feet between the top of the car and the lowest part of the tramway house. The brake wheel could not be operated going through the house [Tr. 63]. Two tracks went in there. The engine always backed the cars up. The engine in this case was below the cars. The engineer could not see what was going on out on the trestle. His view is obstructed by the curve in the track and the house [Tr. 64]. Do not know length of track after it leaves the house. The width of the house nearly shelters two cars. The buffer at the end of the trestle was a stick of Oregon pine 12x12 with long ⅝ bolts bolted to the stringer of the trestle below. [Tr. 65.] I think there were two in each end. They were zigzagged. When the car struck the buffer it stripped the threads of those bolts, shoved the buffer on ahead until the bolts pulled out of the buffer, split the timber straight, shoved it out onto the end of the rails that projected out past the ends of the trestle for some distance; they broke off, and the buffer went down with the car [Tr. 66.] I think the trestle outside of the house would accommodate three cars, with the end of one of them partly under the house.

Have seen cars placed on this trestle; have seen them touch the buffer very light [Tr. 67]. Have seen them at times when car shoved them by hand; we would start them part way up onto
35 it, and they would run back onto the track; they would start to go up on the buffer; if we got them going too rapid; we were always careful not to get them going too fast for fear they would go over. The buffer was an impediment that would stop cars and keep them from going over the end, but not if they were pushed with any force.

Cross-ex.:

I had been working there on the tramway since the railroad came in there [Tr. 68]. I was in a position where I could see the cars about every time they came in. I noticed something unusual the morning of the accident. They were going faster than usual, never had come up so fast, to my knowledge. I anticipated the accident as soon as I saw the train coming up, when I saw the engine did not have hold of them. I never saw them pull in that way before. Had been there then about 14 months, overlooking the operation of the cars there every time they came up [Tr. 69]. Am not a railroad man myself. Have only given estimates of distances. On a long train on a curve the engineer cannot see the rear of the train, but this is obviated by placing a man along the cars or on the cars, who signals to the engineer [Tr. 70]. There is no occasion for the engineer to see the rear of the train. The occasion of operating the cars by hand was, that they would leave a certain num-
36 ber of cars up there, and take the engine away, and the boys had to spot them themselves with a pinch bar. The custom was to push the cars up attached to the engine, and leave them there on the trestle. The engine would spot them, and then we would adjust them in front of the bins as we saw fit. The buffer was there to protect the cars from being blown off by the wind, or to protect us in handling the cars by hand. I have seen the engine push the cars against it easy several times. The engine could handle them a little easier than we could by hand. I was there for 14 months prior to the accident, and afterwards until they stopped shipping [Tr. 71] ore. Never knew a car to go over except this one time.

Redirect:

I have known the wheels to get up part way on this buffer and roll back. I would think that the engineer could get along as safely by taking signals passed from one to another as he could by seeing what he was doing, seeing how near the cars were to the end of the trestle. Generally there was a man out towards the end of the train to see when it got to the end of the trestle. There [Tr. 72] were two cars to be put on the spur in this instance, they had to be shoved pretty close to the buffer in order to let the other car pass. There is another switch, right as the car (track) entered the building from this side [Tr. 73]. They were figuring on putting
37 two cars on one spur, and one on another. They generally come up in there very slow and the man stepped and walked

back to the buffer, and gave the signal when he was about to touch it [Tr. 74]. Never saw them attempt to put up a train of 8 or 10 cars. Two or three was the most. In this case brought up three cars. They may have left others down below. Have known engines to get stalled on grade lots of times. Two or three cars to my knowledge was what one engine could bring up.

A. M. BEAL.

[Tr. 75.] Superintendent of defendant R. R. Co., was such at time of accident. Lyon had been working for us less than a month. His pay check was for 12 days. The buffer at end of trestle was 12 x 12, about 8 ft. long. The buffer is there yet, it was put back again [Tr. 76]. Never has been changed to my knowledge. I am familiar with that character of buffer. An engine has sufficient force to put cars over such a buffer. Have seen wheels of a car pass over similar buffers.

Cross-ex.:

I mean by saying that an engine has sufficient power to put the car over the buffer [77] that I thought the timber was sufficient to protect the car for the purpose for which it was in-
38 tended. If we had put a bumper there sufficient to protect the cars against the force of the engine, it would have demolished the cars. The bumper is similar to lots I have had dealings with before. The purpose of the bumper was for security for hand work, for which they had a great deal to do on that spur, pushing the cars around. When on a level track the wind is sufficient to start cars. There was no necessity for a bumper there at all, so far as our work was concerned, spotting cars with the engine. I have seen ends of chutes and trestles of that description without any buffer at all. They are, of course, put there to stop cars under certain circumstances; just as a man would put a chip under a wheel at times to keep a car from rolling on, but never to stop a car with a locomotive hold of it, or with sufficient velocity to demolish it. [Tr. 78] it is reasonably safe operation to place cars on that trestle with an engine as the performance has proved. No other instance of a car riding that buffer has been reported to me.

Redirect:

As far as train service was concerned, the spotting of cars with the engine, I don't know that the buffer was any benefit to us. The bumper was not intended to be struck by cars while being
39 spotted by the engine. [Tr. 79] An inexperienced employee, not familiar with operating trains, might rely on the buffer. The way we operate [Tr. 80] I think it better to have a 12 x 12 there. If a safe guard was put there sufficient to stop two loaded cars going at 6 miles an hour, it would be liable to demolish or break the cars and [81] pull down the trestle work. Depends on the structure. It could be put up so that it would stop the cars and not knock the trestle down, going six miles an hour.

M. F. O'CONNOR.

[Tr. 99.] Was railroading in July, 1900, working for the G. V. G. & N. as brakeman at the time. Knew the deceased Horatio N. Lyon, at the time of his death he was working as brakeman for the defendant. He went to work about the 5th of July. I do not know, I am not sure about that. I was laying off at the time he came and went to work. I laid off about the fourth or fifth. I don't think he was working when I laid off. Brakeman at that time were getting $80 a month. I do not know exactly, but as near as I can tell, the grade of the track up to the tramway house is four or five per cent. The level track begins about thirty feet from the shed. A brakeman standing on the top of an ordinary box car passing under that tram house could not set brakes to much advantage. I have been railroading in the operation of railroads since I was eighteen
40 years old. I have worked on the A. & P., New York short line, South Park, Rio Grande, and others. Have been operating trains as conductor, and brakeman and in yard work since that time.

Cross-ex.:

I was brakeman two years. Was also conductor. I was conductor when I quit work with defendant. I was yard master before that time. When I was yard master I had something to do with operating trains. I had the control of all trains in the yard. Had nothing to do with the engineering department, and had no supervision over the track or any part of it. Yes, I am able to say whether or not a piece of track is constructed according to railroad or engineering principles. I worked in the track department as foreman of the section gang. Got my orders from the engineers. Sometimes had plans to go by, and sometimes put in a switch, or something like that, without any plans.

Redirect:

Yes, in my experience I have seen that kind of a buffer that was used at the end of the track. I have seen cars go over such buffers. Buffers as high and strong as that or that might have been a couple of inches different.

41 W. A. GOLDER.

[Tr. p. 81.] Reside El Paso, Texas. I am railroading. Have been in that business for fifteen years. I have been following the business of trackman during that time. It is the business of a track man to go over the track and see if it is in proper shape. I have had something to do with the construction of a railroad. Have followed that business steadily for the last fifteen years, on the Atchison, Topeka and Santa Fe and the Gulf Colorado. To a certain extent I am familiar with the construction of tracks, and trestles and buffers and overhead trestles. They were a part of the things I had to do. The overhead structure came under another department.

Cross-ex.:

I am not employed in a railroad now. It has been six weeks since I was employed on the Santa Fe, Rio Grande divisions, between Rincon, New Mexico, to Silver City. Mr. Fox is superintendent of that division. I do not know Arthur B. Wells, he is not the general superintendent of the Santa Fe. I was receiving fifty dollars and up. My business was roadmaster, looking after the road bed. I have had nothing to do with the construction of bridges and bumpers. I have nothing to do in regard to plan-ing and construction of any railroad structure.

42 Redirect ex.:

The planning is done by the engineers. That does not come within my line. They have men employed to do my work. (Here defendant objected to testimony of witness as an expert. Overruled. Exception.)

I went up to look over the premises in question, where there is a track and a house and the track goes through the house and the track goes out overlooking a ravine. I noticed the track and the grade of the track after it left the main track leading off to my right. It is a considerable of an incline. I should judge the grade of that track to be between three and four per cent. It ceases and begins to run on a level in front of the house, on the side furtherest away from the end of the spur. From the house on the grade looks to be level. When the track reaches a level or begins to run on a level, we find a shed there. The house is on each side of the track and overhead. I believe its height is some fifteen feet. After leaving the house, to the end of the spur, is one hundred or one hundred and five feet. The house is of such a character or so constructed that a man standing on top of a car cannot pass through the house standing on the cars. After passing through the building there is very little room to stop a car going at the rate of speed of three or four miles
43 an hour. At the end of the right hand spur, I found a buffer. It is a 12 by 12 piece of pine timber with grooves cut in it to let it down the depth of the rails. That notch or gro-ve was two inches deep. It was bolted there. I examined that piece of timber to see if there were any marks on it. It shows that the wheels have dropped over it.

(Here defendant objected to any testimony about the timber on the ground that the witness is not shown to be qualified as an expert on that subject. Overruled. Exception.)

I would not consider them safe because they are to- low. It would have the effect of letting the wheels roll over it. The diameter of a box car wheel is about thirty inches. One-half of that diameter would be 15 inches. This buffer, ten inches high, would strike the car wheels below the center. If it would not stop the wheels, the body of the car would slide off the trucks and go on over it.

Q. Would it stop a car going at any rate of speed where the obstruction came below the center of the wheels?

A. It would roll over the buffer. I consider it unsafe for the

reason that it would afford an obstruction to the wheels and the car would go over off the trucks. The ravine extending beyond that buffer is something like thirty feet in depth. It is rocky, mountainous. If a car should skid off and go over there it would be probably smashed up. The formation is rocky. The track as it
44 is and in view of the length of it, is safe enough as far as the building is concerned as far as it goes. The track is too short to be safe. I have had the experience of seeing the overhead structures and their effect. Where the construction is so low that the employees of the road cannot stand up on the top of the cars and set the brakes of the cars, they are unsafe. In coming up to this house, owing to the length of the track after having left the house and its condition, the engine would have to be put below the car. After shoving the cars up this spur and reaching the top, the brakes cannot be set on the cars before the engine gets to the top of the incline. The engine would have to get to the top of the incline and the cars would have to pass out of the house before the brakes on the cars could be set. Yes sir, that feature of it adds danger to it. I do not think it at all a safe place to operate cars owing to the incline. It is more dangerous than ordinary tracks.

Recross-ex.:

I first saw these conditions at the United Globe Mine of which I have testified, on Tuesday. I saw it there once. I was there probably thirty minutes. I saw this structure, house, track, ravine, spur, buffer, for thirty minutes during my life time. I never saw
45 any cars pass over it. There were no cars under operation there that day or anything of that kind. I took measurement of the length of the track and spur. I took it with a tape line. I took the measurement of the height*h* of the house. I measured it to the ceiling. It measured fifteen feet. The height of an ordinary box car above the rails average twelve to fourteen feet. The brake bar extends above the top of the car eighteen inches to two feet and a half. An extra large car would not go through that fifteen feet opening. The average car is twelve feet high. The average size car with the average size brake would just pass through there. A man the size of Mr. Davis could get through there by laying down. Mr. Hill read the tape measure. I am testifying as to what he told me. I never was in Globe before this visit. I come here at the request of Mr. Davis. I was brought here to look over the ground and if necessary testify. This is the first time I have accompanied Mr. Davis on the trial of these kind of suits. The size of bumpers that the Santa Fe ordinarily use are twelve by twelve or twelve by fourteen. Twelve by twelve is the standard size used in some places. At Angel, Texas, they use a twelve by twelve stick of timber. It is on the Gulf Colorado. There are two twelve by twelves with an eighteen inch vent between them, making three feet in high*th*, setting one
46 twelve by twelve above the other with a brace. That was on the coal chute.

Q. Do you know of any structure on the Santa Fe or S. P. where anything is used except a twelve by twelve?

A. There is one in Kansas and Iowa. They are built on the same principle as the one I mentioned just now. I never made a special examination of the end of buffers that lead to a mine. Never examined any in Colorado or Nevada. I don't know that it is the universal practice to build and operate these spurs and buffers as this one was built and operated.

Redirect ex.:

There are a great many spur tracks that have this same kind of buffer that I spoke of.

Recross-ex.:

I said in Iowa there are a great many spur tracks on the Santa Fe where they have buffers like that. They use these buffers in Texas. This is not a patent buffer. I was in Iowa in '97. I have never been there since then I do not know what has occurred since '97. I was at Angel, Texas, last October. I had occasion to examine this buffer. The buffers were just put up in the building of the coal chute, they were elevated above the ground about fourteen feet, I suppose. The buffer was at the end of the spur. They built it by bolting it to the track. They are braced on the chute at the end.

47 Redirect ex:

It is an effective buffer. An empty and two loaded cars could go against that buffer at the rate of six or seven miles per hour and be stopped.

A. W. SYDOUR.

[Tr. 104.] My residence is Globe. Have lived here about four years. At the time of the accident was *lived* in Globe. I have worked for the defendant in this case. I have worked for railroads about 20 years. I have been engaged in the transportation service. I have held positions as brakeman and conductor. And switchman, that is all the same thing. From my experience in that line of service, I have had occasion to become acquainted with superstructures over tracks, over bridges and highways, and buffers at the end of chutes and tracks, and as to the control of the cars, the operation of the cars, of the brakes the action of the brakes on the cars, the stopping of cars, the resisting powers of buffers, etc. I worked up there where this buffer is. I don't think that one loaded car and the other empty box car going at six miles per hour could be controlled with the hand brakes on that track, I wouldn't try it, any way. That house is certainly an impediment to operating the hand brakes on the cars. You can't stand up, a brakeman can't
48 stand up on the cars at all until it passed the building. He could not use the hand brakes until after he got out from under the shed. I should not judge that that 12 by 12 pine timber is an effective obstruction. You can't handle eight or nine cars with the engines they have going up that grade. They have to

back up to cross the bridge; there is a bridge at the foot. It is an engine's best effort to get as much as three care up that grade, three loads. An engineer, with a train of seven to ten cars cannot see the position of the cars at the far end of his train in going in on the siding. There is a curve right under the building. A place like that cannot possibly be safe, although people might work there a long time and nothing occur. (Objected to on account of not being an expert. Overruled. Excepted.) In all my experience of 20 years I have not seen a place like this in all respects. I never saw a place like this, where there was a low house, a short track, a long incline, a rocky canyon, a low buffer, and involving all those features.

Cross-ex.:

I don't think I ever saw two places exactly alike in my life. I didn't say I was conductor for the defendant for fourteen months. A matter of a couple of months. I did not work for them 14 months. It would be four years since I left the service, I think, the 17th day of next May; I wouldn't be positive, about that.
49 I worked prior to that two months practically. I worked there prior to this accident. I said the hand brakes could not be worked to advantage going under that shed. I never attempted to use the hand brakes going under that shed. If I had I couldn't; I never took any chances; I got off the train when it got up that far. We put the cars up with the engine; spotted them with the engine. I did that invariably. I did not depend on the hand brakes except when they were spotted. After they were set I sent a brakeman up there and had him set the brakes to keep the cars from drifting along the track. I never depended on the buffer to stop the cars; we never got out that far. We may have got right up close to it, but we were very careful. The size and character of the buffer had nothing to do with the way I put the cars in there. If there had been a buffer there a hundred times stronger, it wouldn't have protected or injured me in any way, because I didn't get that far. No accident occurred during the time I was operating there. If I had started up the hill with a train of cars at a speed sufficient to get the cars at the top of the hill, and just before the cars reached the top of the hill had the two cars in front cut loose, going at a speed exceeding six miles an hour after they reached the top of the grade and as they went under the shed, I would expect them to be in the bottom of the ditch. There
50 would be nothing to hold them; there would be nobody on top to hold them, and because they were thrown that way. I am familiar with buffers at the end of coal chutes. This buffer is about a stand off with the buffers commonly in use in Arizona. It is the same buffer that they all put there, that is the Southern Pacific and the Santa Fe. I generally was stationed there myself when I took more than two or three cars up there. I was always where the engineer or fireman could see me. There was no necessity for the engineer seeing the end of the train not as long as he answered the signals properly. When the rear of a train is not

in sight he depends on signals. The fact whether he could see the end of the train or not is immaterial in the operation of the train. They all spotted cars there the same way. Any other way would have been unsafe method. And would have inevitably caused an accident like what [Tr. 112] was caused here.

Redirect ex.:

If the roof of that shed had been higher or the track longer, I would not have expected to see the cars go into the ditch. It would be almost impossible for a buffer to stop cars going at the rate of six miles an hour. Usually a coal chute is an elevated track and at the end of it usually, they run rails down, so in place of them going over they will run down; when they usually do about 40 times a year. They are without the house overhead. They
51 are open. There might be a roof on top of them, but so high it wouldn't interfere with the braking.

Recross-ex.:

In this case, the cars are put up there by the engine, with the engine attached. They don't depend on the hand brakes or buffers to stop them. It would not make any difference if there was a shed coming down too low for a man to stand on the cars.

Mrs. A. J. Lyon.

[Tr. p. 131.] I am the plaintiff in this suit. I am the mother of Horatio N. Lyon, deceased. He is dead. I was at El Paso at the time of his death. He met his death at Globe. He contributed toward my support in his lifetime. He worked most all the time; and as for his habits, they were good, very good. He was a very good boy. I never did see him under the influence of liquor in his life. He was most always employed. Up to that time I was carrying on a rooming house; but he always helped me. His father was dead at the time of his death. I was a widow at that time and still am a widow. I had two other small boys. They are not alive. Horatio N. Lyon contributed to my support prior to the accident. He gave me $40 to $50 every month when he was working. He was most always employed; sometimes a few weeks at a time
52 he would be out of employment. He never worked for a railroad company before this. He worked for the Wells, Fargo Express Company about four years. During that time he sent me all his earnings that he could spare. He gave me $40.00 every month. I have no property, real estate nor any other means of support. I was 51 at the time of his death. He was 30. He would have been 30 in August. I have no other boys.

Cross-ex.:

When my son worked for the Wells Fargo he ran down on the Mexican Central. He went 700 miles. He was home a part of the time. I cannot tell how much he had been with me during the

past ten years. When he ran on the road he was at home half the time. He was surely a good boy or they wouldn't have kept him in their employ. His wages was in Mexican money. The $40 he would give me would not be Mexican money.

Redirect ex.:

He earned $110. Horatio Lyon was single.

JAMES HARTIGAN (Deposition).

[Tr. 115.] Reside at El Paso. In the grocery business; was formerly a railroad employee, was section foreman and bridge builder; my duties were to see that the track, bridges and all things pertaining therto are in proper condition. The court over-
53 ruled the objection offered to the testimony of this witness as an expert.

Interrogatory 5.

This is a suit in which a hypothetical question will be put, based upon the circumstances, as pleaded by the plaintiff, and will be sought to be established by the testimony, viz: In this suit the plaintiff sues on account of the alleged death of her son, H. N. Lyon, deceased, who, it is claimed, was working for the defendant about the 14th day of July, 1900, and your answer to the following interrogatories will be based upon this hypothetical case, namely, assume that there is constructed and maintained at and near the place where said H. N. Lyon met his death a certain spur or track, leading away towards a ravine; that over said track or spur there is a certain house or shed, through which, or under which, cars are operated; that said track or spur ascends as it approaches said house or shed until it mounts a trestle several feet above the level of the track at the place where said track begins to ascend; that said house, or shed, over said spur, is so low that the brakeman and employees on top of box cars cannot stand erect, but must stoop or lie down, until the cars have passed through or under said house or shed; that the incline of said spur ends at or near said house or shed, and from said house or shed to the end of said spur the track
54 is practically of even grade or on a level, the length of the level track from top of incline to said end of spur being five cars lengths, more or less; that from the house, or shed, aforesaid to the end of the said spur is a distance of 105 feet, more or less; that said track or spur ends at a ravine or depression, said ravine or depression being some 30 feet below the level of the track at the end of the said spur, said track, after leaving said house or shed, and approaching said ravine, being on a trestle several feet high. At the end of said spur or track, overlooking said ravine or depression, is a buffer, or bulkhead, consisting of a piec of 12x12 pine timber (12x12 inches in width and thickness) placed across the end of said track, and fixed to the end of said spur by bolts, passed through said timber, bolting the same to the stringers by ⅝ bolts. That said

timber is notched so as to let in the rails and so that its height above the rails is 10 or 11 inches. Now, kindly state whether or not, in your opinion, a bulk-head or buffer, consisting of a 12x12 pine timber secured by bolts passed through the same as detailed in said hypothetical case, would be a proper and suitable appliance, under circumstances as set forth in said hypothetical case?

The question was objected to on the ground that witness had not shown himself qualified as an expert. Overruled. Exception.

55 Ans. No. It was wholly insufficient, unsuitable and improper under the circumstances named. The reason is that a car going three or four miles an hour would be likely to climb the timber or split it where the bolts fastened the same. The timber is too small, and pine being too soft. A solid timber, such as oak, should have been used. The roof of the shed was entirely too low if it prevented the free use of the brakes by the employees, in view of the length of the spur. Then length of the spur was not sufficient to allow proper application of the brakes after passing under the shed.

The deposition of witness and each part thereof, was objected to upon the ground that he based his opinion as applied to a train going three or four miles an hour. Objection overruled. Exception.

Left my employment on request to resign, was equivalent to a discharge. A locomotive approaching a trestle as described should move slowly and under control, not over two miles an hour. If a locomotive is pushing a train of seven cars in front of it, up a three per cent. grade and at a proper rate of speed, with air-brakes on, it ought to be able to stop in two car lengths, after receiving the signal. It is easier to stop a train going up a heavy grade; it would require a more efficient bulk-head to stop a train going down grade than on the ascending grade.

56 J. A. RUSSELL, testified by deposition as follows:

My name is J. A. Russell, am fifty-six years of age and reside near Earlham, in Dona Ana county, Territory of New Mexico, now temporarily in El Paso county, Texas. I am a ranchman, but expect to again resume railroading. I have followed railroading ever since 1862 continuously until next December, six years ago, that is from 1862 until about December, 1895, during which time I occupied and filled the various positions of brakeman, conductor of pile driver, working train and freight and passenger conductor; also yardmaster and roadmaster. My first experience in railroading was with the Chicago, Rock Island and Pacific under A. Kemble, General Superintendent, in 1862, and continued in their employ for approximately five years, from there I went to the Chicago and Northwestern Railway, for which I worked about six years; from there to the Chicago, Burlington and Quincy, at Aurora, Ill., as General Yard master at that place; do not remember just how many years; from there I went with W. B. Strovey, the first Vice President and General Manager of the Burlington, to the Atchison, Topeka and Santa Fe in June,

1875, being for two years yardmaster at Atchison, Kansas, for
57 the Santa Fe A. & M., and Hannibal and St. Joe, under the Santa Fe system. From there I began work under the Santa Fe system as roadmaster and in charge of the construction work, and continued such until 1888. I then went to work for the M. K. & T. as road master; from there to Colorado where I was yard master at Colorado Springs for the Colorado Midland. The remainder of the time after leaving there I spent in railroading in Old Mexico and California.

Railroading has practically been my life business and study. I am not now connected with any railway company, and have not been since 1895, having quit then on account of my health. The duties of such an one—that is a roadmaster and one having in charge the track department—are to see that all tracks, switches, openings, bridges and culverts, coal chutes and general maintenance is kept in good order and repair, having charge of all track-men in the service of his department. Yes, I consider that I am thoroughly familiar and have had practically a life experience in railroad construction as to track, bumping post, buffers, bulk heads, trestles, overhead structures, and super-structures generally, my duties in such departments having caused me to make all such a special study, both practical and theoretical.

To the fifth interrogatory in which a hypothetical question
58 embodying the facts concerning the condition of the premises as shown by the facts, is asked as to whether, under all the circumstances, the buffer in question was suitable and proper, he answers: No sir, the brace or as you call it, "bulkhead" or buffer was most emphatically insufficient and not a proper or suitable appliance under the circumstances as set forth in your hypothesis. The speed required to shove cars up this incline described in the foregoing question is so great that if anything should happen to the brakes, or a link or pin broke, in my judgment, no brakeman could hold such portion of the train as might break loose with a proper brake, and it would necessarily go over or break such 12x12 timber as described by you.

Asking whether or not the 12x12 pine timber would be inherently safe or unsafe when the cars and trains are prudently and carefully operated, under all the circumstances surrounding the situation, he answers: As a whole inherently unsafe and dangerous. In regard to the bulkhead or brace, I consider it unsafe and unsuitable in every particular. As to the shed, I think the shed was entirely too low and rendered more dangerous the already insufficient bulkhead, or brace, by reason of diminishing the proper use of the brakes by the brakeman. I think the whole thing was a menace to both life and property. Taking all into consideration, I should say it
59 was most emphatically unsafe and dangerous to the employees of the company operating its cars and trains. I think the structure as described evidenced gross negligence upon the part of those constructing *in* and the company using or operating it.

By reason of the nature of the bulkhead used and the height of the shed at such place, I consider the work of the employee extra

hazardous. Serious bodily injury and danger to life were ever present. The premises by employment of reasonable expenses and care could have been rendered less dangerous and reasonably safe, and so rendered by the use of other appliances, and by having constructed the shed higher, so that the brakes might have been freely and properly operated and worked.

Cross-Interrogatories.

I was discharged once with twelve others while I was running as a passenger conductor, the charge being that rebate was not made on fares collected; this charge is denied and is now pending investigation.

To the second cross interrogatory when he was asked at what rate of speed should a train be moved when all cars in said train are being pushed in front of the locomotive and approaching a point within 150 feet or less of the end of a trestle where said trestle is elevated 20 feet or more, above the surface of the ground, he answers:

60 From six to eight miles an hour at the utmost, this however must depend upon other conditions and the place where the car is to be placed. Many different conditions intervene which may change the rate of speed necessary and proper.

To the third cross interrogatory he answers, when he is asked if a locomotive is pushing a train of seven cars in front of it up a three per cent. grade and at a proper rate of speed, at what distance can an engineer stop said train after he is signalled to stop and he has power brakes on his locomotive and air brakes, he answers: From three to four hundred feet.

Certainly it is easier to stop a train going up a heavy grade than it would be if the track were level, or going down a heavy grade. Certainly it would require a more efficient bulk head to stop a train when it is running down a heavy grade onto said bulkhead than if it was ascending a heavy grade towards said bulkhead.

T. S. Brooks.

[Tr. 121.] Was engineer of the train when accident happened. The train was going six or seven miles an hour when the two cars were cut off and [Tr. 122] I got the signal to stop. I could not see what was done at the far end of the train, depended entirely on signals [Tr. 123].

61 Cross-ex.:

As engineer always depends on signals. As long as I can see the man giving the signals, it is immaterial whether I can see rear of train. I got the signals that morning to go up the grade at a certain speed [Tr. 124]. I obeyed all signals as I got them. The conductor was on the fireman's side and I took the signals from the fireman. If there had been no obstructions there, or curve, or grade, or anything, I would not have known what was taking place at the rear of the train, not when I was taking signals from the fireman.

Dr. COLLINS.

[Tr. 135.] Expectancy of son was 40 years, of mother 18 9/10 years.

Testimony Introduced by the Defendant.

H. L. RIGGS.

[Tr. 120.] (Deposition taken by plaintiff, who read only one answer, stating number of cars in train. The deposition was then read by defendant.) Was conductor of the train of which Lyon was a brakeman at the time of the accident. The last time I saw him he was running back and forth on top of a box car, seemingly very much excited; I was setting a brake on the same train at the time on the second car from him; I called to him to set the brake, but
62 he did not attempt to do so, but was running back and forth in an excited manner, and appeared to me like a man who had lost his head altogether.

He was then in the employ of the defendant as brakeman; had been for two or three weeks. I was familiar with the track and premises where Lyon was killed; there were two spur tracks that ran through a shed onto a trestle; there was about room to hold four or five cars north of the shed; the siding that leads up to the spur extends up to the shed, and then the track is virtually level and in good condition; there is room enough on top of a box car under the shed so that a man can sit and turn the brake, but not room enough to stand erect, but a man can sit or stoop and turn the brakes. I was in a hurry to get through that morning; the rate of speed we were going was somewhat unusual; think there were eight or ten cars; I was on the second one from the head end; the two cars were cut loose from the engine; this was unusual—not the customary way of delivering cars at that place; the engineer was not responsible; he was going according to my signals. After I gave signals for the cars to be uncoupled, I discovered the train was running faster than I thought; I signalled the engineer up again in hopes to catch the cars, but at this point the grade was so heavy that he could not
63 do it. Lyon's brake was not set when the car went over. If he had done as directed by me, the accident would not have occurred; I cannot say that he was drunk; his face was flushed, but I can say that he did not do his work right. There were two box cars cut loose from the end of the train being pushed up onto the spur; I was on the second car, Lyon was on the first; I was conductor, he brakeman; prior to the accident I had been in the employ of defendant about ten months; had been railroading nineteen years; I had put cars on this spur before by a running or flying switch, once or twice. It is true that if cars are placed upon that spur connected with the engine until so spotted or placed, the cars being connected with the engine with air brakes, that such operation is perfectly safe. On this occasion I directed the use of the flying switch because I was in a hurry and thought it could be done safely; no one authorized me to do it—did it on my own responsibility. The only way I can account for the accident is that Lyon did not understand his business.

R. S. McCLAY.

[Tr. 159.] Was a clerk of the United Globe Mine at the time of the accident and for two or three months before. I weighed the cars and went up and saw the cars placed; saw them each time they were placed. This particular train went faster than I ever saw it before. The cars were accustomed to be placed in there con-
64 trolled by the engine backed up to their respective places, and the brakes set and the engine cut loose. The only purpose served by the buffer was to keep the cars from rolling off by their own weight. Saw the cars put in there nearly every day. While I was there they were never put in any other way. The cars had to be placed so as to be loaded or unloaded in certain places about the mine.

B. JONES.

[Tr. 174.] Now of Bisbee, was superintendent of defendant for three years. As such, he employed H. L. Riggs as conductor, and at the time instructed him to work under standard rules. These rules were compiled by an association of railroads. I observed Riggs in his work. He showed knowledge and I considered him competent. The structure at the United Globe mines was built under the direction of the engineers of the road. The premises are occupied by the Mining Co. The shed was there before road was built. The manner of putting cars in there was pushing them up, with the engine attached, until the cars stopped. Never saw them put in in any other way. I was superintendent from the time the road was built until March, 1900, and never heard that cars were ever put in in
65 any other way. The premises are reasonably safe. There were no accidents there during the year of my superintendency. That spur is 150 feet long. There would be no difference as to safety if the track were longer. The removal of the house would not make it safer. I guess if they would cut the house so as to make it higher this would make it safer. I rather think if the track were longer that would make it safer [P. 179]. [Tr. p. 171] A draw-bar buffer the jar would be more effective, and it would smash things up and be liable to break down the structure. Everything possible [Tr. p. 175] was done at this place to make it safe. He had credentials that he was a railroad man.

ARTHUR G. WELLS (Deposition).

[Tr. 135.] General Manager of the Santa Fe R. R. lines west of Albuquerque. Always engaged in railroading; successively as apprentice, trainmaster, superintendent, general manager. Has had experience with construction and practical operation of track, switches, bumpers, spurs, coal chutes and elevated sidings, having constant opportunity because of his duties to observe such practical operation. The appliance most commonly used by railroads as a bumper at the end of elevated tracks, coal chutes, and the like, is a timber about 12 x 12 inches, bolted across the rails at the end of the

trestle. Such appliance is reasonably safe. The object of such
66 bumper is merely to hold cars that may become lo-se or detached. If so constructed as to resist cars thrown against it with unnecessary violence, there would be danger of knocking down trestle of ordinary construction for this purpose.

Interrogatory 7th.

Described a safe method of putting or spotting cars on a spur reached by an incline, and ending in the air at an elevation of twenty or thirty feet from the ground, a bumper twelve by twelve inches wide and thick being bolted across the rails at end of track. Show the difference, if any, in the safety of the operation when cars are spotted while connected with the engine (air brakes being used) and when thrown in by the momentum reached before being detached by what is known as a "running switch."

Interrogatory 8th.

Assume that there is constructed at a point on the line of the defendant's railroad a certain spur or track to and upon the premises of a certain mining company, which spur is intended to be used to supply said mining company only, and over a portion of said track there is a shed through which or under which cars are moved; that said track or spur ascends as it approaches said shed until it
67 mounts a trestle several feet above the level of the track at the place where it begins to ascend; that said shed is so low that brakeman on top of box-cars cannot stand erect, but must stoop until the cars have passed through; that the incline of said spur or track ends at or near south line of said shed, and from there on the track is on even grade that from the north line of the shed to end of track is between 105 and 110 feet; that said track or spur ends at a ravine or depression, said ravine or depression being some thirty feet below the level of the track at the end of said spur, the track, after leaving the shed, being on a trestle. At the end of the track, overlooking said depression, is a buffer or bulkhead consisting of a piece of pine timber twelve inches by twelve inches in thickness and width, placed across the end of said track and bolted to the same by two five-eighths inch bolts.

Please state if the appliances above described were reasonably safe if the train crew used ordinary skill in spotting cars on said spur.

To the seventh interrogatory he answers:

The proper method of putting cars on spurs reached by an incline such as is described is with an engine coupled thereto, air being used if in working order, but brakemen to be on cars to call hand brakes into play in case of any air failure. If car is thrown
68 in by momentum it would constitute a very unsafe and unusual method.

To the eighth interrogatory he answers:

Such appliances as are described in this interrogatory I should regard as reasonably safe if train crew used ordinary care in spotting cars thereon. I should regard a train conductor who threw cars

in on such a spur by means of running switch, depending wholly upon brakemen upon the cars to stop the same by means of hand-brakes, as remiss in his duty, and taking chances which should not have been incurred. Any railway track or appliance, no matter how constructed, may be rendered unsafe by use in a reckless or unskillful manner.

EPES RANDOLPH (Deposition).

[Tr. 135.] Civil engineer, for 25 years engaged in the location, construction and operation of steam railways; has been successively assistant engineer, resident engineer, chief engineer in construction of railroads, and, in their operation, assistant and general superintendent; for six years superintendent of Southern Pacific lines in Arizona and New Mexico; now general manager of Los Angeles Railway Company.

The same questions were propounded to this witness as to Mr. Wells, and the answers are to the same effect as there given. He added that the conduct of the conductor, as described, was
69 contrary to good practice, and was the grossest sort of carelessness.

E. L. SWAIN (Deposition).

[Tr. 135.] Resident engineer of So. P. Ry. Co., long experience in the construction of railroads; testifies to the same effect as Mr. Wells and Mr. Randolph.

BRUCE TYLER (Deposition).

[Tr. 181.] Has been railroading since 1880; since 1883 has been employed in train service, brakeman and conductor. In 1898 entered service of defendant as brake man, then conductor. Was yard conductor at Globe in 1899; then went to employment on other roads in Colorado and Kansas. By the experience above noted, has had opportunity to observe the appliances in use by railroads generally, at chutes and spur leading to mines or similar places. The tracks are generally on grade, and the appliances are secure with careful work. I worked on each of the switches nearly every day at the United Globe mine. I placed the cars to spot while coupled with the engine, and after spotting I blocked the cars, released the air brakes, if on cars, set up the hand brakes, and bled the cylinders, before cutting the engine off. I found the appliances in use there very satisfactory. The buffer was a timber. I think 16 inches square.
70 I never had reason to take exception thereto. Think the buffer was secure for proper work. Cars were never spotted there to my knowledge by means of a running or flying switch. Such method, or any way than by spotting the cars with engine attached should consider very dangerous. The manner in which we did our work we entertained no fear of danger either by the shed or buffer at end of track.

WILLIAM GARLAND.

[Tr. 136.] President and general manager of defendant company. Has been such from original construction to present time. The road was constructed under the engineering direction of William Hood, chief engineer of the Southern Pacific R. R. The road was built into Globe Nov. 1898 [Tr. 137]. I have had 25 years' experience in the construction and operation of Railroads. I am familiar with the structure at the United Globe mine. The trestle and appliances there correspond exactly with the plan. They were built just exactly as they were intended to be built. I have in my experience noticed a great [Tr. 138] many places of similar character on the Sou. Pac. and the Santa Fe R. R. in Arizona. The structure here is quite safe in operation, when done with reasonable care. Recklessness or gross carelessness would make it unsafe, would make anything unsafe. When I have seen cars spotted there, they
71 were run up in the regular train and spotted just at a certain place, wherever the car was required and then uncoupled. The engine was always left attached until the cars were spotted in the proper places. As long as they were attached to the engine, they were under the perfect control of the engineer. There was no danger, no possible chance of their going off while attached to the engine. [Tr. 139] I never saw cars put there in any other way. If cars were thrown in there detached from the engine and going at six or seven miles an hour, the chances are that there would be disaster. It would be a very improper method, if there was sufficient resistence to hold the cars. [Tr. 140] During the five years the road has been in operation up there, no injury has been inflicted in any way except this one accident to Lyon. About all that hand-brakes are used for in places of that kind is to be put on after the car is spotted that the car may remain in proper position; or in case the air failed, they would do the best they could with hand brakes. [Tr. 141] The brakeman is not sent through under the shed for the purpose of stopping the cars with the hand brakes, but to be there to set the brakes when cars are spotted by the engine. The bumper is there as a precautionary measure, in case mischievous boy- let the brake off, and the car might start on account of heavy wind blowing,
72 or boys might push it. The bumper was not designed to stop cars thrown against it at any rate of speed. In my experience never knew of a bumper that was planned or constructed for that purpose. It would be impracticable to stop loaded cars going six or seven miles an hour by a bumper, and to my knowledge is not adopted [Tr. 142] by any railroad.

In reference to the up grade at this point, of course it is much easier to stop a train going up grade than down, or even on a level track. Until the cars reached the top of the grade, the train could be stopped very easily.—As soon as an engineer shut off his engine. The grade itself is sufficient to stop them. A train going six or seven miles an hour could stop within at least one car length, if engineer shut off the engine and applied air brakes before reaching the top grade. [Tr. 142] The conduct of a conductor who would cause the two rear cars to be cut off while going at that speed, depending on

the hand brakes to stop them, would be very careless and reckless—very dangerous conduct. [Tr. 143] I have never authorized any such method. Running and flying switches are condemned universally. If the conductor in this case was attempting to throw two cars on one spur, and then to slacken up, and throw another car on another spur, I would call that a running switch; some might call it a flying switch.

73 Cross-ex.:

[Tr. 144.] Am very familiar with that bulkhead. I did not know that car wheels had rolled upon the buffer and then rolled back. [Tr. 145.] The buffer was set down on the rails two inches, so as to have 10 inches above the rail. There were notches cut on a portion of the buffer, where the wheels would strike first; a car wheel is 30 inches in diameter. It would cut a notch in the bumper without even leaving the rail. [Tr. 146.] The flange of the wheel is pretty sharp; it will penetrate a bumper up to the thread of the wheel, then it will go no further. You could not move a car by hand and throw it over a ten inch stick. [Tr. 147] I would say a buffer a man could push a car over by hand, I wouldn't consider it any buffer at all. [146-147.]

I do not think the house there was unsafe. There are so many of them used that way—for instance back in old warehouses, about that high, it is never high enough above the car for a man to stand erect [Tr. 148]. I think the house was just as safe there as if it had been made higher. A brakeman can put on the brake better sitting down than standing. He has to stoop any way. [Tr. 149]

74 13 feet is the average height from roof of car to rails. The roof of the house was the floor of the ore-mixing bin. It could have been raised. To have raised it would have disarranged the whole thing; you would have to arrange your whole tramway over from the mines. That was a matter for the mining company; we didn't have anything to do with that. [Tr. 150] The track could have been extended across the cañon. I do not recollect saying that it was a dangerous track.

Q. Didn't you tell Mr. Maurel that track was too short; it was dangerous; and you wanted to extend it across the canyon?

—. No, sir, I never did.

Q. Didn't you ask to buy a piece of his property, so you could extend your track across; telling him it was dangerous, and you wanted to make it longer?

A. No, sir, I never did—positively never did. Oh, there is hardly anything ever done quite so well but what it could be done a little better.

The premises were amply arranged for the duty they were intended to perform—would not want them any better from a safety standpoint.

Redirect:

[Tr. 151] There would have been no object in respect to safety, in raising the house higher. It would not have been safer. There are

various places along the lines of railroads where there are warehouses, sheds, and coal bins, and cars are put in those places,
75 when there is not room for a man to stand. The operation is perfectly safe when conducted with ordinary care.

A. M. BEAL.

[Tr. 152.] Have been superintendent of defendant company four years. Have charge of the operation of the road in all its branches pertaining to transportation. Knew the method of spotting cars at the spur at this mine. The method was to spot them attached to the engine, by the air. [Tr. 153] Had six or more years' experience in railroading before coming to defendant. Have had opportunity to inspect similar structures on the lines of road in Arizona. The buffer here at the end of the track is quite similar to those in general use. I next saw the buffer after the accident lying on the ground below—it was knocked off the trestle. It was put back there and has been in place serving the same purpose since. Saw it last about a month ago. I have served with the Union Pacific, Santa Fe, Mo. Pacific & Wabash roads. I think the structure at the United Globe Mines reasonably safe for the business handled there. No injury or accident to any one has occurred there *to any one* during my superintendency, except to Lyon. Never knew of any instance when conductor undertook to spot cars there by throwing them in detached from the engine.
76 That would be an improper and unsafe method. [Tr. 155.]

Cross-ex.:

Kicking of cars in on side track in good condition the situation being safe, is allowable. Not kicking in on turn tables, or in the round house, or any tracks that terminate with a spur. The ordinary way of doing switching is to cut loose and kick cars. The ordinary car varies in length from 28 to 45 or 50 feet; average 34 feet, with coupling 36 feet. [Tr. 156] Prior to the accident, I had recommended the track be lengthened for economy in handling loading cars [Tr. 156]. If the track were longer and extended across the cañon, it is evident that this would give more opportunity to stop the cars by means of the [P. 157] hand brakes. The extension would necessarily have made stopping cars easier. The recommendation was with a view of increasing business which we were expecting. My observation is the length of the spur makes no difference; it will hold more cars. It is evident that if the track were longer, it gave more opportunity to stop cars with handbrakes. Usually a spur is built no longer that is necessary to transact the business [Tr. 158]. The appliances there were perfectly safe for the purpose for which they were used. Never saw the cars strike the bumper there. I do not think it would have been
77 safer where the cars are controlled by the engine if the tracks had been longer after leaving the house.

S. T. ARKILL.

[Tr. 164.] Locomotive engineer on defendant's railroad for nine years. Prior to that [Tr. 165] with S. P. Co. fireman, switch engineer and road engineer. Have taken cars up on the spur at the United Globe Mine for five years now. They were shoved up there and spotted with the engine. I never saw the cars cut loose from the engine in any of my work up there; always spotted them with the engine, with the air. During the five years that work has been going on there, no accident or injury has occurred to any one while I was doing the work. Am familiar with the situation there [Tr. 166]. An experienced man that had been working and accustomed to such places would be fixed and prepared to get out of the way in plenty of time. It would not take him long to get off the car and get out of the way. There was nothing there that could not be seen at once. [Tr. 167] In putting cars through there, never relied on the hand brakes; always relied on the engine and air. The shed had no effect on our stopping the cars. So long as the cars were spotted by the engine, there would not have been the least difference in the operation of the cars if the shed had not been there.

78 A person didn't need to be on top. I worked for the S. P. where there was the same thing as that, same block. Have seen places similar to this. The buffer at this place was just the same as at similar places, except at a union depot where passenger trains come in, I have seen them different. [Tr. 168] The conduct of a conductor who threw cars in this spur detached from the engine and going six or seven miles an hour, was improper and not the usual method. That was the first time I ever knew it to be done. It was not good railroading. [Tr. 169.]

Cross-ex.:

The engine was No. 3, a small engine [Tr. 170] Down the incline that engine could not handle them (7 to 10 cars) up there, could on a level. The level track up there would accommodate about five cars. The engine would have power with seven cars (empties) to throw two in on one spur and another on the other spur. [Tr. 171] Have tried it. Don't think I said on former trial that engine could not stop down below the incline with three or four cars, and then come on up the hill.

Plaintiff in Rebuttal.

ANDRE MAUREL.

[Tr. 182.] Witness is asked as to conversation with "Mr. Garland." Defendant objected [Tr. 183] because his attention
79 was not called to time or place, or the exact language used. Question withdrawn.

Q. Did Mr. Garland ever say to you that the track leading away from the smelter towards the cliff, towards the canyon, was too

short, and it was dangerous, and that he wanted to extend it across the canyon? [Tr. 184.]

Defendant objects on the ground that there is no proper foundation laid for the examination; that the language is not the same language that was asked of witness Garland. Objection overruled. Exception.

Answer—Yes, sir.

Cross-ex.:

Have a lawsuit with R. R. Co. Have been prosecuted and sent to jail for six months for tearing up R. R. track.

GEO. R. HILL.

[Tr. 185.] Assisted in measuring premises. The house is 15 feet above R. R. track. Heard Mr. Arkill testify in former trial. He testified to the following:

Q. "When there would be three or four cars on the down grade could your engine stop 3 or 4 cars there on that grade and then back in on the other switch?" A. "The engine couldn't handle that many cars."

Q. "Could it stop and then come on up?" A. "You couldn't do it with many cars."

80 Q. "You couldn't spot the cars?" A. "No sir."

This was all the evidence.

Instructions.

The evidence being concluded, the defendant thereupon moved the court to instruct the jury to find a verdict for the defendant. The motion was made upon the ground that upon the undisputed facts in the case it appears that the primary and moving cause of the accident to the deceased, Lyon, was the negligence of his fellow servant, Riggs.

The motion was denied, to which ruling the defendant then and there excepted.

Thereupon, the defendant submitted to the court four special interrogatories and requested that the same be submitted to the jury for their answer, as follows, viz:

The court instructs the jury to answer each of the following questions "yes" or "no" and sign each answer by the foreman.

I.

Was the method of throwing in the cars detached from the engine adopted by the conductor on the occasion of the accident, the usual and customary method of doing such work?

Answer ——.

—— ——, *Foreman.*

81 II.

Was said method of throwing in the cars a reckless and unsafe method?

Answer ——..

—— ——, *Foreman.*

III.

Was the adoption by said conductor of said method on this occasion the proximate cause of the accident to Lyon?

Answer ——.

—— ——, *Foreman.*

IV.

Was the conductor Riggs guilty of gross negligence in the manner in which he ordered the work done?

Answer ——.

—— ——, *Foreman.*

Refused:

E. KENT, *Judge.*

Thereupon the court denied said request, and in so doing stated as follows:

The COURT: Mr. Burnett, you have submitted here some four special interrogatories to be submitted to the jury. The court is somewhat in doubt as to the propriety of submitting any interrogatories in a case of this kind, but I have concluded to submit them as desired, except that I am unwilling to submit the third interrogatory as submitted by you, because I fear that the jury may
82 misunderstand the use of the word "proximate" and may be misled thereby in attempting to answer the question. I am willing to submit this question by the substitution of the word "solely" for the word "proximate," not intending thereby in any way — indicate that the use is not proper as specified by you in the third interrogatory, but only that the jury may be misled by the word "proximate," and the word "solely" is the nearest word to fit the case that I can think of. If you have any other word that you prefer to use, which would be proper under the circumstances, I will consider your suggestion.

Mr. BURNETT: Note an exception for the defendant to the ruling on the matter.

The COURT: I don't understand what you mean by your exception. Do you mean you wish me not to submit it in the form I suggest, or do you prefer to have it submitted in the form I suggest, rather than not to have it submitted at all?

Mr. BURNETT: I object to any submission to the jury of any question or proposition which holds or requires the finding on their part that the company is liable unless the negligence of the conductor was the sole cause of the injury.

The COURT: Under your view of the case, I will refuse to submit any question to the jury.

Mr. BURNETT: The defendant excepts to the ruling of the court.

83 Thereupon the court gave to the jury the following oral charge, to which and to each paragraph thereof, the defendant at the time excepted.

The COURT: Gentlemen of the jury, as you have heard from the evidence in this case, on or about the 14th day of July, 1900, one H. N. Lyon, who was a brakeman in the employ of the Gila Valley, Globe and Northern Railway Company, met his death by reason of an accident occurring on a branch or spur of the railway company's track at the United Globe smelter in this town. The plaintiff in this case, who is the mother of the man who was killed, seeks to recover in this action damages against the railway company for the death of her son.

A railroad company, gentlemen, is not necessarily liable in damages for accidents that occur on its road. Because a brakeman is killed, the railroad company is not necessarily liable to pay damages for his death. Under certain circumstances, it is liable, and the question for you to determine in this case, under the law as the court gives it to you and the facts as you find them, is whether in this case the defendant railway company is liable to pay any damages to this plaintiff in this action; and, if so, how much.

84 If the accident causing the death was brought about by the negligence of the dead man himself, or his negligence contributed thereto, then you cannot, gentlemen, find a verdict against this defendant company. If the accident was brought about solely by the negligence of the conductor of the train, a fellow-servant, the defendant company is not responsible in damages, and you cannot find a verdict against the defendant in this case.

Negligence, for the purpose of this case, I will define to be a failure to use such care as a person of ordinary prudence would use under like circumstances.

Now, in this case, the conductor of the train was a fellow-servant of the man who was killed, and if the accident was brought about solely by the negligence of the conductor of the train, then the defendant company is not liable; or if the accident was brought about by the negligence of the conductor and the negligence of the man who was killed, the defendant company is not liable. If, however, the accident was caused by a failure of the defendant company to provide a reasonably safe place to perform the work in which the man who was killed was engaged, then the defendant company is liable in damages for the death, if it was negligent in not providing such safe place.

85 The fundamental question, therefore, for you to determine in this case is, what was the cause of this accident; what brought it about?

If you find that this accident was caused solely by the action of the conductor in the method which he employed in putting cars on the spur at the time in question, then you should find a verdict for the defendant company, and you should not award any damages to the plaintiff in this case; or if you should find that the dead man

has through his own negligence brought about this accident or contributed to it, then you should find for the defendant, and you should not award any damages in this case.

On the other hand, if you find that the defendant company was negligent in not providing a reasonably safe place for the performance of the work, you should find for the plaintiff and award her damages, provided that the negligence of the defendant in not providing such a safe place was the cause of the accident or contributed to the accident.

To find for the plaintiff, it is not enough that you should find that the premises were unsafe, or that the defendant company was negligent in that respect, in not providing a safe place; you must also find that the place was unsafe, and that the accident was brought about or contributed to by reason of that unsafe place. That is, if you should find that the act of the conductor was the sole,
86 or if you should find that it was the proximate or the procuring cause of the accident, then you should not award damages; but if you find that the accident was caused by the acts of the conductor and also by the negligence of the defendant company in not providing a safe place to do the work, then you should find damages for the plaintiff. In other words, in order to award damages to the plaintiff, you must find, first, that the defendant company was negligent in not providing a safe place to do the work, and that such negligence was the cause of the accident or contributed thereto. If you find the accident was brought about solely by the acts of the conductor, you should not award damages. If the acts of the conductor alone did not cause the accident, but the accident was contributed to by the negligence of the defendant company by not providing a safe place to work, then you should award damages.

In determining this case, gentlemen, you should take into consideration all the evidence in the case. You are the sole judges of the evidence, of the weight to be given it, and of the credibility of the witnesses; and from the evidence before you, you should determine these questions:

First: Was the place where the deceased was working a reasonably safe place for the performance of the work to be done there—
87 a reasonably safe place considering the character of the work to be done and the character of the premises?

Second: If you find it was not reasonably safe, and the defendant company was negligent in that respect, did that fact have anything to do with the accident, or was it caused by the negligence of the conductor of the train alone?

If it was caused solely or procured or brought about by the negligence of the conductor, then the defendant is not liable. If the negligence of the defendant company contributed to the accident, then the defendant is liable, provided the dead man himself was not guilty of any negligence which contributed to the accident.

There is also another defense interposed by the defendant company in this case. It claims it is not responsible in damages, since the risk is one which was assumed by the deceased. It was a risk, they say, incident to his employment. In that respect, the law is

as follows: The employment of a railroad brakeman is necessarily a dangerous and hazardous employment. Those who enter into it, knowing that it is dangerous, assume all the risks and perils involved therein, as well as all the risks of injury resulting from the negligence of their fellow-servants; and if you believe from the evidence that the deceased, H. N. Lyons, saw the condition of the tracks and the building through which the track runs, the coal
88 chute, and the short distance from the end of the building to the bumper, and knew the danger, if any, incident thereto, or if by the use of proper care and observation could have known them, and continued in the service of the defendant and suffered injuries therefrom, then the plaintiff cannot recover in this action.

The burden of establishing that fact—that the decedent, the man who died, knew the condition of affairs and knew the risks and the danger, or could have known it with ordinary care and observation, as I have instructed you—the burden of proving that is upon the defendant company; but in all other respects the plaintiff must prove her case by a preponderance of the evidence. In all civil cases, it is incumbent upon the plaintiff to make out his case—he must make out, or she in this instance, must make out her case by a preponderance of the evidence. If you are not satisfied, and the evidence weighs evenly, you must find for the defendant. If the evidence has a preponderance in favor of the plaintiff on these matters as I have explained the law, and the facts as you find them, then you should find for the plaintiff on the other issues—that is, plaintiff has to establish her case by a preponderance of evidence; but on this question of assuming risk, that is something the defendant must establish.

89 If your verdict in this case should be for plaintiff, you should award her damages not exceeding the sum of $5,000, and such damages as you believe from the evidence she has sustained, allowing her such pecuniary compensation within that sum as you believe from the evidence she would probably have received from her son, had he lived. If you find that, you will find your verdict for the plaintiff and fill in the amount and your foreman will sign the verdict. If you find for the defendant, your verdict will simply be for the defendant and signed by your foreman. I will hand you forms of verdicts to find as you go out.

Those are the principal questions for you to find in this case. There are certain instructions submitted to the court, in addition to what I have given you, that I will read to you where they are not already included in what I have said.

Your verdict, gentlemen, must be unanimous; all of your number must agree, not nine; it must be the whole twelve.

The court thereupon gave to the jury, at the request of defendant, the following instructions:

I.

You are the exclusive judges for the weight to be given to the testimony and of the credibility of the witnesses, but you will
90 receive the law from the court in these instructions and be governed thereby.

Given: E. KENT, *Judge.*

II.

You are instructed that the defendant corporation is not a guarantor of the safety of the machinery, appurtena-ces and appliances provided for the use of its employees. The defendant is only required to use reasonable care in the selection of its machinery and appliances, and to keep them in such condition as to be reasonably safe for the use of its employees.

Given: E. KENT, *Judge.*

III.

The degree of care required from a railroad company in respect to the condition and equipment of its tracks and roadbed is to be measured by the exigencies of the situation, and will often depend upon the situation of the road and the topography of the ground. The rule, that it is the duty of the master to provide his servant with a reasonably safe place in which to work, is not an absolute one, but is qualified and limited by another rule, to-wit: that the servant assumes all the risk incident to the service in which he is employed, so far as those risks at the time of his entering upon the service are known to him, or should be readily discerned by a person of ordinary capacity and understanding in the exercise of ordi-
91 nary care, whether the business is dangerous or not. Such rule does not deprive the master of the right to manage and conduct his business according to his own judgment, even though other methods might be safer, and whether such dangers are known to or are readily discernible by a person of ordinary capacity and prudence, then the master has fulfilled his duty in the premises, and in such case is not liable for damages. An employee is not entitled to an absolutely safe place to work in, but only a reasonably safe place to work in, and to reasonable care on the part of his employer in view of the situation and the danger.

Given: E. KENT, *Judge.*

IV.

The court further instructs the jury that if they believe from the evidence that for a year or more prior to the death of Lyon it had been the uniform custom of the employees of the defendant to put its cars on the spur in question by pushing them in with the engine, and under control of the engine, and that said method was reasonably safe in view of the situation of the premises, and that the conductor of said train, H. L. Riggs, was aware of said custom, and knew that said method was reasonably safe, and also knew that to throw said cars in, detached from the engine, as was done at
92 the time of the accident, was unsafe, and said conductor caused said cars to be thrown in by said unsafe method and that such act was the proximate cause of said accident, and that said unsafe method was adopted without the direction or authority from defendant, then the plaintiff cannot recover.

Given: E. KENT, *Judge.*

V.

If the jury believe from the evidence, that the accident to Lyon was proximately caused by the negligence of his fellow servant, the conductor, then it is immaterial whether Lyon had had previous experience as a brakeman or had received rules of conduct or instructions from defendant as to his duties.

Given: E. KENT, *Judge.*

VII.

The court instructs the jury that it is not to be presumed from the mere fact that the deceased was employed by the defendant that such killing was caused by the fault or negligence of the defendant. On the contrary, the burden of proof rests upon the plaintiff to show by a preponderance of evidence that the injury complained of was caused by or was the fault of the defendant, as charged in the complaint.

Given: E. KENT, *Judge.*

VIII.

The court further instructs the jury that all the trainmen
93 engaged in operating said train at the time of the injury were fellow-servants with the deceased Lyon, and the law is, that if said injury was proximately caused by the conductor of said train, then the plaintiff cannot recover. If a workman or employee is to work in conjunction with others, he must know that the carelessness of one of his fellow-servants may be productive of injuries to himself, and he must know that neither care nor diligence by the employer can prevent the want of due care and caution on the part of his fellow servant. The servant upon entering upon the employment is supposed to know and assume this risk.

Given: E. KENT, *Judge.*

IX.

The court instructs the jury that in no event can they return a verdict in this action for a greater amount than five thousand ($5000) dollars, and that no verdict can be received unless concurred in by the unanimous vote of the twelve jurors.

X.

The jury is further instructed that while it is the duty of those employing workmen to furnish a reasonably safe place to work, yet the principle is not applicable when the place becomes dangerous in the progress of the work from manner in which the work is done,
or is made dangerous only by the carelessness and neglect of
94 fellow-servants; and in this case, although the jury may believe from the evidence that better and safer appliances might have been used by the defendant company, yet the defendant is not thereby renderd liable in this action if the proximate cause of the accident was the negligence of the conductor in the manner in which he conducted the work on this occasion.

Given: E. KENT, *Judge.*

XI.

The jury is further instructed that while it is the duty of the master to furnish reasonably safe appliances and a reasonably safe place to work in, yet when the master has performed his full duty in this respect, risk of injury will still arise, varying according to the situation and the nature of the work, and especially is this true in the operation of a railroad. These are called perils or risks of the service, and so far as they are known to the employee, or can be known by reasonable observation and skill in the servant, the latter assumes all such risks, and the master is not responsible for any injury resulting therefrom.

A servant of adult age assuming to undertake the service of a railroad company as brakeman, thereby represents himself as competent for the work, and as capable of knowing the perils
95 of the service, such as assumed by the servant, as defined by the preceding instruction.

Given: E. KENT, *Judge.*

The court thereupon modified the following instructions, requested by defendant, and gave the same as modified to the jury. To which modification and giving the same as modified, the defendant at the time excepted.

You are instructed, gentlemen of the jury, that the employment of a railroad brakeman is necessarily dangerous; that those who enter into it knowing that it is dangerous, assume the natural and ordinary risks and perils involved, as well as all the risks and injuries resulting from the negligence of a fellow servant, and if you believe from the evidence that the deceased, H. N. Lyon, saw the condition of the track and the building through which the track runs, the coal chute, and the short distance from the end of the building to the bumper, "and knew the danger, if any incident thereto" or by the use of ordinary care and observation could have known them, and continued in the service of the defendant, and suffered injuries therefrom, then plaintiff cannot recover in this action.

Modified, and as modified Given:

E. KENT, *Judge.*

(Modification consists of adding the words in " ," line 9.)

96 The jury is further instructed that one of the perils of the service in railroading assumed by the employee, is the possible negligence of his fellow employees. In this case the deceased Lyon was a fellow servant with the conductor, Riggs, and the defendant cannot be held liable in this action if the accident was proximately caused by negligence on the part of such conductor. And "if" it is shown by "the" evidence before you that the conductor on this occasion adopted an unusual and unsafe method, that he knew it to be and unsafe method and contrary to the usual custom, and that said conductor was grossly careless in employing said method, and if you believe that said negligence was the "procuring" or proximate cause of the accident, you should find for the defendant.

Modified, and as modified Given:

E. KENT, *Judge.*

(Modification consists of by striking out and inserting words as shown above, words stricken out)—words inserted " ."

The court refused the following requests for instructions, to which refusal and to each of them, defendant at the time excepted.

The court instructs the jury that the ground upon which plaintiff seeks to recover in this action is simply and solely the claim made,

97 that the so-called "bumper" fastened across the end of the spur track in question was not, under the conditions existing at that place, of sufficient strength to hold the car switched or spotted upon said track, and that in consequence of said alleged defective bumper the car on which the deceased stood was thrown into the canyon beyond. The court instructs you, however, that although the jury may believe from the evidence in the case, that the bumper was not of sufficient size or strength to stop cars thrown against it at the speed used at the time Lyon was killed, yet the plaintiff in such case is not entitled to recover, if the jury further believe, from the evidence, that said bumper was not intended for the purpose of stopping cars thrown with any degree of violence against it, and that there was a safe way usually employed in such switching by which the cars were placed on said spur, with the engine so attached until so placed, and that the accident in question would not have happened if the conductor of said train had not, in this instance, directed the two cars to cut loose from the rest of the train and thrown onto the said spur, thus detached by means of a "kick" or a running or flying switch, as described in the evidence, and that this action of the conductor was unusual and unsafe, contrary to the usual custom of said railroad, and was the direct cause of said

98 accident, and done without the knowledge or authority of said defendant, and in violation of the custom and rules of the defendant covering the operation of its trains, then, in such event, the plaintiff is not entitled to recover, and you should find for the defendant.

Refused: E. KENT, *Judge.*

Although the jury may believe from the evidence that the appliances furnished by the defendant company were defective as alleged by the plaintiff, yet if the jury further believe from the evidence that the conductor was negligent in the manner in which he conducted the work on this occasion, and that such negligence of the conductor was the proximate cause of the accident, without which such accident would not have happened, then the jury should find for the defendant.

If there was negligence on the part of the defendant as alleged, that fact would not render the defendant liable if a new independent cause intervened, without which the accident would not have happened.

Refused: E. KENT, *Judge.*

The test by which the safety of machinery and appliances in any given employment is, that they are the same as are commonly used by persons engaged in like business, and if you believe from the evidence in the case that the machinery and appliances of the de-

fendant are such as are commonly used by other railroad
99 companies in Arizona engaged in the same business and for similar purposes, then I instruct you, that you will find for the defendant in this action.

Refused: E. KENT, *Judge.*

Upon the coming in of the verdict and the entry of judgment thereon, defendant moved the court for a new trial, which motion was in writing as follows:

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant in the above entitled cause and moves the court for a new trial, on the following grounds, to-wit:

I.

That the court erred in admitting evidence in behalf of the plaintiff duly objected to by the defendant.

II.

That the court erred in rejecting evidence offered by the defendant and objected to by the plaintiff.

III.

That the court erred in charging the jury:

1st, in giving each and every instruction asked for by the plaintiff.

100 2nd, in refusing instructions requested by the defendant, and in modifying other instructions asked for by the defendant.

IV.

Upon the ground that the evidence does not sustain the verdict or judgment.

V.

That the court erred in overruling the motion of the defendant for dismissal of the action.

VI.

That the court erred in overruling the motion of the defendant to instruct the jury to return a verdict for the defendant.

VII.

That the court erred in overruling motion to strike out parts of plaintiff's pleading in reply.

FRANK W. BURNETT,
Attorney for Defendant.

Filed Dec. 14th, 1903.

The court denied said motion, to which ruling defendant then and there excepted.

The foregoing matters not appearing of record, said court is requested to settle and allow this bill of exceptions, heretofore presented, which is accordingly done, this 5th day of March, 1904.

EDWARD KENT, *Judge.*

101 In the Supreme Court of the Territory of Arizona.

No. 857.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,

vs.

A. J. LYON, Appellee.

It is hereby agreed by and between the parties to the above styled and numbered cause, pending in said court, that the same be submitted upon the written briefs of the parties, heretofore filed herein, without oral argument from either side, and the parties hereto join in the request that the court decide said cause upon the written briefs filed as aforesaid.

Witness the hands of the parties hereto, by and through their attorneys, this 13th day of December, A. D., 1904.

FRANK W. BURNETT,
Attorneys for Gila Valley, Globe & Northern R'y Co., Appellant.
FALVEY & DAVIS AND
GEO. R. HILL,
Attorneys for A. J. Lyon, Appellee.

(Endorsed:) No. 857. In the Supreme Court of the Territory of Arizona. Gila Valley, Globe & Northern R'y Co. *vs.* A. J. Lyon. Stipulation. Filed Dec. 17, 1904. S. M. Cullom, Clerk.

102 No. 857.

In the Supreme Court of the Territory of Arizona.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,

vs.

A. J. LYON, Appellee.

Appeal from District Court, Gila County.

Before Chief Justice Kent.

Appearances.

Frank W. Burnett for appellant.
Falvey & Davis, and George R. Hill, for appellee.

Opinion by SLOAN, *J.:*

This is the second appeal in this case. Upon the first appeal the judgment rendered in the court below in favor of the appellee was

reversed and a new trial granted upon the ground of error in the giving of an erroneous instruction and in refusing to give a proper instruction. 71 Pac. 957.

Upon a retrial of the cause a verdict was again found by the jury in favor of the appellee and a judgment entered thereon.

From the ruling of the Court denying its motion for a new trial and from the judgment, appellant brings this appeal.

The first error assigned is based upon the refusal of the trial Court to instruct the jury, at the conclusion of the evidence, to return a verdict for the defendant upon the ground, as stated
103 in the motion made in that behalf, that the evidence failed to make out a case of negligence on the part of the defendant railroad company. The evidence adduced upon the second trial was substantially the same as upon the first trial. We held upon the first appeal that this evidence was sufficient to warrant the submission of the question of negligence, on the part of the railroad company, to the jury. It is settled law that all rulings made by the Appellate Court upon a first appeal become the law of the case and are conclusive upon any subsequent appeal.

Roberts *vs.* Cooper, 20 Howard, 467.
Clarke *vs.* Keith, 106 U. S., 464.
U. S. *vs.* Nuestra Senora de Regla, 103 U. S., 92.

Counsel for the appellant, before the argument of the case, requested the trial Court to submit certain special interrogatories to the jury for their answer. The Court expressed a willingness to do this but found exception to the wording of one of the interrogatories submitted and suggested an amendment thereto. Counsel declined to consent to any amendment to the interrogatory whereupon the Court refused to submit any special question to the jury. This ruling is assigned as error.

At common law the practice of submitting special interrogatories to a jury was not allowed and the finding of the jury was restricted to a general verdict or a special verdict as it might elect.
104 In certain of the older states a practice originated at an early day of the Court submitting certain questions to the jury to be answered by them as supplementary to a general verdict. In many of the states this practice has been incorporated into the stattues. As a rule these, unless mandatory in terms, are construed as permitting the practice, but leaving it to the sound discretion of the trial Court whether it be followed in any particular case.

Paragraph 1427, Revised Statutes, reads: "In all cases, whether "law or chancery, where more than one material issue of fact is "joined, interrogatories may, under proper instructions, be sub-"mitted to the jury by the Court in writing," etc. A cursory reading of this statute discloses that it is directory and not mandatory and that it leaves the matter of submitting the interrogatories in any case to the sound discretion of the Court. Such has been the ruling of this Court. Mercantile Co. *vs.* Clack, 71 Pac. 925.

Exception is taken to the oral charge of the Court, in that it does

not follow the law as laid down by us upon the first appeal. That part of the charge of the Court complained of reads as follows:

"If the accident causing the death was brought about by the "negligence of the dead man himself, or his negligence contributed "thereto, then you cannot, gentlemen, find a verdict against this "defendant company. If the accident was brought about solely by "the negligence of the conductor of the train, a fellow-servant, the "defendant company is not responsible in damages, and you cannot "find a verdict against the defendant in this case.

105 "Negligence, for the purpose of this case, I will define to "be a failure to use such care as a person of ordinary pru-"dence would use under like circumstances.

"Now, in this case, the conductor of the train was a fellow-servant "of the man who was killed, and if the accident was brought about "solely by the negligence of the conductor of the train, then the "defendant company is not liable; or if the accident was brought "about by the negligence of the conductor and the negligence of the "man who was killed, the defendant company is not liable. If, "however, the accident was caused by a failure of the defendant "company to provide a reasonably safe place to perform the work "in which the man, who was killed, was engaged, then the de-"fendant company is liable in damages for the death, if it was "negligent in not providing such safe place.

"The fundamental question, therefore, for you to determine in "this case is, what was the cause of this accident; what brought it "about?

"If you find that this accident was caused solely by the action of "the conductor in the method which he employed in putting cars "on the spur at the time in question, then you should find a verdict "for the defendant company, and you should not award any dam-"ages to the plaintiff in this case; or if you should find that the dead "man has through his own negligence brought about this accident "or contributed to it, then you should find for the defendant, and "you should not award any damages in this case.

"On the other hand, if you find that the defendant company was "negligent in not providing a reasonably safe place for the per-"formance of the work, you should find for the plaintiff and award "her damages, provided that the negligence of the defendant in not "providing such safe place was the cause of the accident or contrib-"uted to the accident.

"To find for the plaintiff, it is not enough that you should find "that the premises were unsafe, or that the defendant company was "negligent in that respect, in not providing a safe place; you must "also find that the place was unsafe, and that the accident was "brought about or contributed to by reason of that unsafe place. "That is, if you should find that the act of the conductor was the "sole, or if you should find that it was the proximate or the procur-"ing cause of the accident, then you should not award damages; but "if you find that the accident was caused by the acts of the conduc-"tor and also by the negligence of the defendant company in not "providing a safe place to do the work, then you should find dam-

"ages for the plaintiff. In other words, in order to award damages "to the plaintiff, you must find, first, that the defendant company "was negligent in not providing a safe place to do the work, and "that such negligence was the cause of the accident or contributed "thereto. If you find the accident was brought about solely by the
"acts of the conductor, you should not award damages. If
106 "the acts of the conductor alone did not cause the accident,
"but the accident was contributed to by the negligence of the "defendant company by not providing a safe place to work, then "you should award damages.

"In determining this case, gentlemen, you should take into con- "sideration all the evidence in the case. You are the sole judge of the "evidence, of the weight to be given it, and of the creditability of the "witnesses; and from the evidence before you, you should determine "these questions:

"First: Was the place where the deceased was working a reason- "ably safe place for the performance of the work to be done there— "a reasonably safe place considering the character of the work to "be done and the character of the premises?

"Second: If you find it was not reasonably safe, and the de- "fendant company was negligent in that respect, did that fact have "anything to do with the accident, or was it caused by the negli- "gence of the conductor of the train alone?

"If it was caused solely or procured or brought about by the "negligence of the conductor, then the defendant is not liable. If "the negligence of the defendant company contributed to the acci- "dent, then the defendant is liable, provided the dead man himself "was not guilty of any negligence which contributed to the acci- "dent."

Upon the first appeal we said:

"If the act of the conductor was the proximate cause of the "injury, then it made no difference with respect to the freedom "from liability of the defendant, as a matter of law, whether the "negligence of the conductor was or was not coupled with the de- "fendant's negligence. It is, of course, well settled that, if the injury "was caused both by the negligence of the fellow servant and the "negligence of the master, then the master is liable. His negligence "is then a contributory or co-operative cause, for which he is liable."

"But when the proximate cause of the injury is the negligence "of a competent fellow-servant, no recovery can be had, even "though the place or appliances are defective, and the master is "negligent in that respect; and whether such negligence of the "fellow-servant was the proximate cause, or whether the defendant's "negligence was a contributory cause, is ordinarily a question for "the jury."

The trial Court, in his oral charge, used the term "proximate cause," as applied to the negligence of the conductor, as synonymous
with "sole cause." It becomes important to determine whether
107 this language of the charge, implying that unless the negli-
gence of the conductor was the "sole cause" of the injury the defendant was liable, is inconsistent with the declaration of law

laid down by us. It is apparent that, in that part of our former opinion which we have quoted, we used the term "proximate cause" as implying the opposite of concurring or contributory cause. This use of the term "proximate cause" in the opinion was proper enough and was not misleading when construed in the light of the context. It was not, however, in its application to the subject matter of the charge to the jury the only term, or, indeed, the best term to convey the meaning of the Court.

Strictly speaking, where an accident is caused by reason of concurring acts of negligence on the part of the defendant and another, the negligence of neither can be said to be the "proximate cause," nor is the term "proximate cause" properly used in designating the cause of the accident. The term "proximate cause," in the sense in which it is ordinarily used, means the efficient cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produced the event and without which that event would not have occurred. If the event cannot be said to be the natural and continuous sequence of the act of negligence, then such negligence becomes remote and not proximate.

Insurance Co. *vs.* Boon, 95 U. S. 130.
Milwaukee & St. Paul Ry. Co., *vs.* Kellogg, 94 U. S. 470.

108 Where an accident in the natural and continuous sequence of concurring acts of negligence committed by two or more persons, such concurring acts of negligence become the proximate cause of the accident.

Kraut *vs.* Frankford, 28 Atl. 783.
Sc. 160 Pa. St. 327.

It is only when the negligence of either of two persons, shown to have been guilty of negligent acts, was a sufficient cause in itself, in the sense that the event would naturally have resulted therefrom independent of the negligence of the other, that the negligence of the former can be said to be the proximate cause. In such event the proximate cause becomes the sole cause.

In the case at bar it was the duty of the railroad company to have exercised reasonable care and caution to construct and maintain its spur at the place where the accident occurred so as to guard against such accidents as might reasonably have been foreseen as liable to happen. If it failed in its duty in this respect it was guilty of negligence and if this negligence contributed to the accident, in the sense that otherwise it would not have occurred, then its negligence, coupled with the negligence of the conductor, in operating the train became the proximate cause; on the other hand, if the conductor was guilty of negligence in operating the train, and this negligence, coupled with the negligence of the railroad company in the matter of the construction and maintenance of its spur, was the cause
109 of the injury, such negligence on the part of the conductor was a concurring or co-operative cause but not the sole cause. If the negligence of the conductor was such as would have resulted in the accident even had the railroad company exercised due care and diligence, then the negligence of the conductor would have been not

only the "proximate" but the "sole" cause of the injury and the railroad company would not be liable.

The issue raised by the pleadings and submitted was whether the accident was caused in whole or in part by the negligence of the company. The question whether the company was liable would be answered in the negative were the jury to say that the conductor's negligence was the sole cause of the accident, for if the sole cause then no negligence on the part of the company could have contributed to it. The Court did, therefore, properly charge the jury that in determining the question whether the company was liable for the injury they were to find whether negligence on the part of the company contributed to the accident, or whether it was brought about solely by the negligence of the conductor.

We think the instructions complained of are consistent with the holdings of the Court upon the former appeal, and we think they, considered as a whole, could not have mislead the jury to the prejudice of the defendant.

The instruction requested by the defendant and refused by the Court, and which was made the subject of the eighth assign-
110 ment of error by appellant, was clearly not the law for the reason that it contained an improper definition of "proximate cause" as we have herein defined the term, and for the additional reason that it did not give effect to our former declaration of law relating to the effect of concurring or co-operative acts of negligence.

None of the other assignments of error relating to instructions given and others refused present reversible error.

With regard to the last assignment of error which relates to the admission of the testimony of certain "expert" witnesses and the objection of the defendant that these were not shown to be competent to give their opinion as to the safety of the place where the deceased was at work, it is sufficient to say the question of their competency was a matter that rested in the sound discretion of the trial Court, and we do not find that this discretion was abused.

Spring Co. *vs.* Edgar, 99 U. S. 645.

The judgment is affirmed.

RICHARD E. SLOAN,
Associate Justice.

We concur:

FLETCHER M. DOAN,
Associate Justice.

GEO. R. DAVIS,
Associate Justice.

(Endorsed:) No. 857. Supreme Court. G. V. G. & N. Ry. Co. *vs.* A. J. Lyon. Opinion. Recorded Book 6, page —. Filed M'ch 30, 1905, S. M. Cullom, Clerk.

111 In the Supreme Court of the Territory of Arizona.

No. 797.

GILA VALLEY, GLOBE AND NORTHERN RAILROAD COMPANY,
Appellant,
vs.
A. J. LYON, Appellee.

Appeal from the District Court of the First Judicial District in and for the County of Gila.

Before Justice George R. Davis.

Frank W. Burnett, for appellant.
Falvey & Davis, for appellee.

Opinion by Kent, C. J.

This was an action brought by the appellee for damages for injuries resulting in the death of her son, alleged to have been brought about by the negligence of the defendant railroad company, the appellant in this court. The case was tried before the Court and a jury.

The facts adduced upon the trial showed that the defendant, a railroad company, to accom-odate the business of a certain mine near Globe, in this Territory, built a sidetrack several hundred yards long, running from the main track for some distance up a steep grade and near the top of the grade branching into two spurs. At
112 the top of the grade, and where the ground began to be level, these tracks passed under a shed, a structural part of the mine company's plant, for about 30 feet. On ordinary freight box-cars passing under the shed brakemen were compelled to stoop or sit down because of the nearness of the top of the car to the roof of the shed. Beyond the shed the tracks were extended upon a trestle about 110 feet long and designed for the placing of cars for convenience of loading and unloading at the mine. At the end of this trestle the tracks stopped on the edge of a steep ravine or canyon. In order to place and leave cars on this spur or sidetrack, there being but one connection with the main track, the engine could not go in in advance, but the cars had to be pushed up this spur, and, as the incline was steep leading from the main track, with a small engine some speed was at first required in order to reach the top of the incline. At the place where the steep grade ceased the shed referred to spanned the track in such a way as to cut off the view between those on the engine and the far end of a train pushed up the incline on the sidetrack. The roof of the shed was so low as to make it difficult to use hand-brakes on the cars while passing through the shed. There was no obstruction placed at the end of the track and trestle which would prevent the cars from going beyond the track and falling into the ravine, except a piece of pine timber of a size 12x12 inches,

bolted at each end and screwed to the ties, rising to a height
113 above the rails of 10 or 12 inches. The object of this timber was not to serve the purpose of what is known as a "bumping-post," and the timber was not sufficient to arrest the motion of cars propelled at even a comparatively slow rate of speed, but was placed there primarily to prevent cars that were stationary on the track and that might become loosened by accident or otherwise, from running off the track at the end, and was sufficient for that purpose.

The decedent was employed by the defendant company as a brakeman and had been in its service for about twelve days when he met his death; and during that time he had been frequently on the premises in question engaged in his duties as a brakeman, but it was not shown that prior thereto he had had experience in the duties required of him. Under ordinary circumstances, in switching cars onto this sidetrack, it was proper and usual to keep the engine attached to the cars until they were stopped at the desired position. At the time of the accident in question, instead of adopting the usual method, the conductor of the freight train upon which the decedent was employed adopted the usual method, while the train was in full motion, of cutting off two cars from the rest of the train, which was being pushed by the locomotive, intending to let them go in on the sidetrack by their own momentum and with the aid of the deceased, who was on the front car, stop them by means of the hand brakes when they had attained the desired position. When the cars were cut off the train they were going at a rate of speed estimated by some witnesses as great as six miles an
114 hour, After they had passed through the shed they were still going at such a rate of speed that the deceased and the conductor, who was on the last car, were unable to control them and the forward car, upon which the deceased was riding, knocked the pine parrier from its position and was precipitated with the deceased into the ravine, and the deceased was immediately killed.

There was nothing to show that the deceased was aware of the purpose of the conductor to cut the cars loose from the train, or that, although the deceased knew the premises, he had had sufficient experience either to be aware of the danger of the premises or to be chargeable with the knowledge of the dangers as a matter of law. Testimony was offered by the defendant to show that the premises were reasonably safe when used in a proper manner; and by the plaintiff to show that they were dangerous, not only when used in a reckless manner, but dangerous even when the work was performed with due care. The evidence, however, tended to show that if the cars had been put in on the side-track in the usual manner, that is, by being attached to the engine with the use or air-brakes until the cars had attained the position desired, the accident and injury would not have occurred; and that the accident was brought about by the method adopted by the conductor of the train in cutting off the end cars and sending them up on the side-track without the control of the engine. It appeared, also, that this unusual method had been resorted to once or twice before by
115 the conductor, but that the ordinary custom, known to the

conductor, who was an experienced man, was to "spot" the cars by means of the engine.

The Court denied the motion of the defendant to instruct the jury to return a verdict for the defendant, and the jury returned a verdict for the plaintiff in the sum of $5,000.

The first error assigned is that the Court at the close of the evidence should have directed a verdict for the defendant; and it is urged that the case comes within the rule that if the evidence, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict if returned must be set aside, then it is the duty of the Court to direct a verdict for the defendant.

Rendall *v.* Balt. & Ohio R. R., 109 U. S. 478.

Upon the evidence in this case, however, we can not say that the jury would not have been justified in returning a verdict for the plaintiff on the ground that the premises provided by the master for the work to be done were not reasonably safe, if the master's negligence in this respect contributed to the accident. The testimony as to the character of the premises is not so conclusive or undisputed as to make it a question of law for the Court rather than a question of fact for the jury to decide whether the premises were reasonably safe, and if unsafe whether the negligence of the master in that respect contributed to the injury. We think it was not error, therefore, for the Court to refuse the direction requested.

116 We have next to consider the errors assigned in the instructions to the jury given by the Court, and in the modification by the Court of the instructions requested by the defendant and as so modified given to the jury.

At the request of the plaintiff the Court instructed the jury in effect that if they believed that the track was not constructed for the purpose of switching cars in the manner in which it was done on the occasion of the injury, but that the track was intended to be used for switching such cars by means of a locomotive engine connected with the cars by air-brakes, or, as it was termed, by "spotting" the cars, they they should decide whether the defendant was negligent in failing to notify its employees that the track was constructed for the use in such latter manner, and in failing to require them to use it in such manner, or was negligent in not warning them from using the track in the manner adopted at the time of the accident, and if the injuries resulted from a failure of the defendant to so warn its employees, or resulted from the negligence of the conductor combined with such failure to warn its employees, the plaintiff was entitled to recover, unless the jury should find against the plaintiff under the subsequent provisions of the charge.

We think in this case the question whether the defendant was negligent in failing to make such rules or give such warning as specified should not have been submitted to the jury. The

117 complaint contained no charge of negligence in this respect, and that issue was not properly raised. The evidence showed that the employees worked under standard rules familiar to all

railroad men of experience, with which the conductor was familiar, and that to have made such a rule as suggested would have been extraordinary, or, as expressed by one witness, "would have been called a ridiculous order." The evidence further showed that the conductor had a knowledge of the uniform custom in respect to the method of performing the work which was being done at the time of the accident, and that such custom was not the method employed by him at the time of the accident, but was the method of spotting the cars above referred to. Where such a uniform custom exists, sanctioned by the master, and the employee has knowledge of such custom, the necessity of the adoption of formal rules in respect thereto is dispensed with.

Rutledge *v.* Mo. Pac. Ry Co., 123 Mo. 121;
Luebke *v.* Ry. Co., 63 Wis. 91;
Texas & P. R. Co. *v.* Campbell, 39 S. W. (Tex.) 1104.

And the failure to adopt a rule as to precautions to be observed by his employees is not proof of negligence rendering a master liable to a servant, unless it appears from the nature of the business in which the servant is engaged that the master in the exercise of reasonable care should have foreseen the necessity of such precautions.

Morgan *v.* Hudson River Co., 133 N. Y. 666.

In the instructions given by the Court at the request of
118 the plaintiff the Court said, in substance, that if the injuries were caused by the negligence of the conductor and the negligence of the defendant did not contribute thereto, the jury should find for the defendant; but that if the conductor was negligent and the defendant was also negligent in reference to the character of the premises or in the failure to notify its employees with reference to spotting the cars on the track, and such negligence of the defendant contributed to the injuries, then the plaintiff should recover. Except so far as in this case the question of rules or notice is concerned, this instruction correctly stated the law as to the liability of the master for a concurring cause. In the main charge given, the Court does not discuss the question of proximate cause, nor, except as above stated, was the question presented to the jury whether if such negligence of the conductor, who it is admitted was the fellow servant of the deceased, was the direct or proximate cause, the defendant could still be held liable if in any way at fault.

From the evidence in this case we think the fundamental questions to be determined by the jury in arriving at their verdict, apart from the question of assumed risks, were with respect to the character of the premises as providing a reasonably safe place for the work, and, if unsafe, whether the negligence of the master in that respect or any other contributed to the injury, or whether the injury was proximately caused by the negligence of the fellow
119 servant. We think, therefore, that the jury would have had the matters to be determined more clearly in mind, if the Court in its main charge had instructed them specifically as to the

freedom from liability of the defendant if the proximate cause of the injury was the negligence of the fellow servant. The absence of such instruction would not alone be ground for reversal where a charge, as given, correctly interpreted the law in other respects. The defendant, however, requested the Court to give to the jury the following instruction:

"The court further instructs the jury that if they believe from the evidence that for a year or more prior to the death of Lyon it had been the uniform custom of the employees of the defendant to put its cars on the spur in question by pushing them in with the engine, and under control of the engine, and that said method was reasonably safe in view of the situation of the premises; and that the conductor of said train, H. L. Rigg, was aware of said custom, and knew that said method was reasonably safe, and also knew that to throw said cars in, detached from the engine, as was done at the time of the accident, was not a safe method, and that on the occasion of the accident, said conductor caused said cars to be thrown in by said unsafe method and that such act was the proximate cause of said accident, and that said unsafe method was adopted without direction or authority from the defendant, and had not been used more than two or three times before then the plaintiff cannot recover, although defendant had furnished no written or printed rules governing the operation of trains at that point."

The Court refused the instruction as requested, but modified it by striking out the words "had not been used more than two or three times before" and inserting in the place thereof "was not coupled with any negligence on the part of defendant company," and gave the instruction so modified. The latter part of the instruction then read:

120 "* * * and that on the occasion of the accident, said conductor caused said cars to be thrown in by said unsafe method and that such act was the proximate cause of said accident, and that said unsafe method was adopted without direction or authority from the defendant, and was not coupled with any negligence on the part of the defendant company, then the plaintiff cannot recover, although defendant had furnished no written or printed rules governing the operation of trains at that point."

We think the Court overlooked the effect of this instruction as so modified, in its relation to the freedom from liability of the defendant if the negligence of the fellow servant was the proximate cause. If the act of the conductor was the proximate cause of the injury, then it made no difference with respect to the freedom from liability of the defendant, as a matter of law, whether the negligence of the conductor was or was not coupled with the defendant's negligence. It is, of course, well settled that if the injury was caused both by the negligence of the fellow servant and the negligence of the master, then the master is liable; his negligence is then a contributory or co-operative cause for which he is liable.

R. R. Co. *vs.* Cummings, 106 U. S. 700.
Elmer *v.* Locke, 135 Mass., 575.
A. T. & S. F. Ry. *v.* Larmigan, 42 Pac., 343.
Morrisey *v.* Hughes, 27 All. (Ver.), 205.

But when the proximate cause of the injury is the negligence of a competent fellow servant no recovery can be had, even though the place or appliances are defective and the master is negligent in that respect; and whether such negligence of the fellow servant was the proximate cause or whether the defendant's negligence was a
121 contributory cause is ordinarily a question for the jury.

Wood on Master & Servant, 812.
Vizelich *v.* So. Pac. Co., 126 Cal., 587.
Trewatha *v.* Buchanan G. M. & M. Co., 28 Pac. (Cal.), 571.
So. Pac. Co. *v.* Yeargin, 109 Fed. Rep., 436.
Whitman *v.* Ry. Co., 17 N. W. (Wis.), 124.
C. N. O. & T. P. Ry. *v.* Mealer, 50 Fed. Rep. 725.
M. & S. P. Ry. Co. *v.* Kellogg, 94 U. S., 469.
Norfolk & W. Ry. Co. *v.* Brown, 22 S. E. (Va.), 496.
Edmondson *v.* Kent. Central Ry. Co. 49 S. W. (Ken.), 200.
Ariz. Lumber & Timber Co. *v.* Mooney, 42 Pac. (Ariz.), 952.
Little Rock & M. R. Co. *v.* Baxiy, 84 Fed. Rep. 944.

It is the master's duty to provide a safe place to work, but that principle is not applicable where the place becomes dangerous in the progress of the work from the manner in which the work is done, or is made dangerous only by the carelessness and neglect of fellow servants.

C. C. & St. L. R. R. *v.* Brown, 73 Fed. Rep., 970.
Callaway *v.* Allen, 64 Fed., 297.
Hussey *v.* Coger, 112 N. Y., 614.
Hogan *v.* Smith, 125 N. Y., 774.

In the instruction as modied and given, the jury were justified in believing that although they should determine that the negligence of the fellow servant was the proximate cause of the injury, or the place was made unsafe solely by reason of the unsafe method adopted, they might yet find a verdict for the plaintiff, provided, only, they should find that the defendant was negligent in some respect, whether such negligence contributed to the injury or not. The error in this instruction as given was not so cured by the main charge on the question of concurrent liability that we can say the jury was not misled by it.

The defendant also requested an instruction to the effect
122 that at the time of the injury all the trainmen were fellow servants with the deceased, "and the law is that if said injury was proximately caused by the conductor of said train, then the plaintiff cannot recover." The Court modified the instruction by inserting after the word "train" the words "without previous notice in the defendant company of the conductor's incompetency, carelessness or negligence." We think this modification was not correct, in view of the pleadings and the testimony. No allegation is made in the complaint of incompetency on the part of the conductor, or that the master had notice thereof; nor was there evidence, if such incompetency existed, that the company had such notice, or that it could have had such notice by the use of reasonable diligence. We do not think the jury should have had left to them to determine the

question of fact as to whether notice was given to the company of any incompetency of the conductor; and if it were proper to leave this question for them to determine, it should not have been left in a form from which the jury might assume as a fact that the incompetency existed.

For the reasons stated, we think the judgment should be reversed and the case remanded to the District Court for a new trial.

EDWARD KENT, *C. J.*

We concur:
RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*

(Endorsed:) No. 797. In the Supreme Court of the Territory of Arizona. Gila Valley Globe and Northern Railroad Company, Appellant, *vs.* A. J. Lyon, Appellee. Opinion by Kent, C. J. Recorded Book 5 Page- 230-238. Filed March 20. 1903, S. M. Cullom, Clerk.

123 In the Supreme Court of the Territory of Arizona, January Term, 1905.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,
vs.
A. J. LYON, Appellee.

Petition for Rehearing.

Now comes the said appellant and moves the Court for a rehearing of the above-entitled cause, and as reasons therefor said appellant alleges as follows:

I.

The Court erred in its decision of the main question discussed in the brief, to-wit: as to whether the Court below erred in instructing the jury that if there was any negligence on the part of appellant, then appellee was entitled to recover, unless the negligence of the conductor was the sole cause of the accident.

The decision, counsel insists, is a radical departure from all established precedents. The question is one of the highest importance, and the reasoning by which the conclusion was reached is fallacious; it is made to turn upon the proposition as stated by the
124 Court.

"Where an accident is the natural and continuous sequence of concurring acts of negligence committed by two or more persons, such concurring acts of negligence become the proximate cause of the accident."

This proposition can have no application here, because the negligence of one of the parties—the conductor—was imputable to the deceased, and hence the question of proximate and remote cause cannot be eliminated without violence to the rights of appellant.

The Court cites only one case to sustain this conclusion, to-wit, that the united negligence of the parties constituted the proximate cause: Kraut *vs.* Frankfurt, 28 Atl., 783; same case, 160 Pa. St., 327. How far from sustaining the Court is this case is shown by the following extract from the Opinion:

"The unusual speed of the car and the defective crossing were both factors, and, as the defendant was responsible for both, it is useless to speculate as to which was the remote, and which the proximate, cause."

It will be seen from the foregoing that no such question was involved as has been decided in this case. Counsel insists that not only does no decided case sustain the reasoning of the Court, but that it is also in express and direct conflict with the decisions of the Federal courts, which are presumed to be controlling in this jurisdiction; for instance, the decison of the C. C. A. in Callaway *vs.* Allen, 64 Fed. 297, cited at page 18 of Appellant's opening brief, is on all fours with the case at bar and flatly contradicts the con-
125 clusion here reached. So do all the numerous cases cited.

The two cases cited in the Opinion in the U. S. Supreme Court were fire insurance cases, the question being as to the remote or proximate cause of the fire. In these cases we have no question of contributory negligence on the part of plaintiff or of his fellow servant. The Courth as evidently overlooked these distinctions, and counsel is satisfied that, upon further consideration, it will correct the error. Certainly, this Court does not wish to go permanently on record as adopting a rule purporting to be supported by only one cited case, and this case, as above shown, having no application to the point.

II.

The Court erred in not sustaining the second assignment of error, to the effect that the verdict was against the weight of evidence. This question was not raised on the former appeal, and was not referred to by the Court upon the second appeal, although strongly urged. Counsel feels that whatever doubt there may be as to the first assignment, there can be no question as to the verdict's being against the weight of evidence.

This motion has been hastily prepared, and, if practicable, will be followed by a printed brief in support thereof. Counsel for appellant entertains the highest esteem for this Court and its members, and in filing this petition or anything said therein, no possible disrespect for the Court or any of its members is intended. If
126 language too emphatic is anywhere used, it is that attention may be called to what counsel deems to be a failure to note the distinction as to the application of the rule of proximate cause in cases where the plaintiff or his fellow servant is charged with contributory negligence and in the other cases where no such question exists.

The attention of the Court is again respectfully called to the

briefs on file in this action, and the authorities cited therein, which counsel thinks abundantly sustain the contention.

Respectfully submitted,

FRANK W. BURNETT,
Attorney for Appellant.

(Endorsed:) No. 857. In the Supreme Court of the Territory of Arizona. Gila Valley, Globe & Northern Railway Co. *vs.* A. J. Lyon. Motion for rehearing. Filed Apr. 8, 1905. S. M. Cullom, Clerk.

127 In the Supreme Court of the Territory of Arizona.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,
vs.
A. J. LYON, Appellee.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Frank W. Burnett, first being duly sworn, upon oath states: That he is the attorney for the appellant in the above entitled action, and is seeking a Writ of Error to this Court from the Supreme Court of the United States for the purpose of reviewing the judgment rendered by the Supreme Court of Arizona on the 30th day of March, 1905, in favor of said appellee and against said appellant; that the amount involved on said Writ of Error exceeds, exclusive of costs, the sum of $5000, to-wit, the sum of $5000, the amount of the judgment rendered in the District Court of Gila County December 14, 1903, and interest thereon at the rate of 6% per annum to the said 30th day of March, 1905, as provided by the statutes of said territory.

FRANK W. BURNETT.

128 Subscribed and sworn to before me this 26th day of May, 1905.

S. M. CULLOM,
[SEAL.] *Clerk of the Supreme Court of the Territory of Arizona.*

(Endorsed:) No. 857. In the Supreme Court, Territory of Arizona. Gila Valley, Globe & Northern Railway Company, Appellant, *vs.* A. J. Lyon, Appellee. Affidavit of Frank W. Burnett. Filed May 26, 1905. S. M. Cullom, Clerk.

129 In the Supreme Court of the Territory of Arizona.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,
vs.
A. J. LYON, Appellee.

Petition for Writ of Error to the Supreme Court of the United States.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the Territory of Arizona:

Now comes the said appellant, Gila Valley, Globe & Northern Railway Company, and respectfully represents to, and petitions your Honors as follows, to-wit:

That in the above entitled action heretofore, to-wit, in the District Court of said Territory of Arizona in and for the County of Gila, the said appellee did on the 14th day of December, 1903, have and recover a judgment against said appellants for the sum of $5000 and costs of suit.

That the said appellant thereafter, and within the time allowed by law, appealed from said judgment to this Court, and by appropriate proceedings the said cause was presented on said appeal to this Court
for its determination upon the record as presented, and that
130 thereafter, to-wit, on the 30th day of March, 1905, this Court by judgment then duly made and entered affirmed the judgment of said District Court in and for the County of Gila.

That thereafter the said appellant, as permitted by the rules of this Court, did on the 8th day of May, 1905, present and file its certain Petition for Re-hearing of said action to this Court, which said petition having been duly considered by this Court, was thereafter, to-wit, on the 26th day of May, 1905, denied and said judgment of said District Court in all respects affirmed.

That at the time of said affirmance the said judgment of this Court was for an amount largely exceeding the sum of $5000. That said appellant is advised that in the proceedings of this Court and its decision errors have occurred which should be reviewed by the Supreme Court of the United States, and therefore your petitioner respectfully asks that your Honors, or the Chief Justice of this Court, allow a writ of error to the said Supreme Court of the United States whereby the record in the above entitled action may be transferred to said Court for a review of the errors alleged to have occurred and in order that justice may be done.

Respectfully submitted,

GILA VALLEY, GLOBE & NORTHERN
RAILWAY COMPANY,
By FRANK W. BURNETT, *Its Attorney.*

131 Writ of Error Allowed.

RICHARD E. SLOAN,
Presiding Justice.

Supersedeas bond to be $12,000.

RICHARD E. SLOAN,
Presiding Justice.

(Endorsed:) No. 857. Supreme Court, Territory of Arizona. Gila Valley, Globe & Northern Railway Company, Appellant, *vs.* A. J. Lyon, Appellee. Petition for Writ of Error to the U. S. Supreme Court. Filed May 26, 1905, S. M. Cullom, Clerk.

132 In the Supreme Court of the United States.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY. Plaintiff in Error,
vs.
A. J. LYON, Defendant in Error.

On Error to the Supreme Court of the Territory of Arizona.

Assignment of Errors.

Now comes the said Gila Valley, Globe & Northern Railway Company *Company,* plaintiff in error, and alleges that the said Supreme Court of the Territory of Arizona committed manifest error in its judgment and proceedings in the above entitled action in the following particulars, to-wit:

On the hearing in said Supreme Court of the Territory of Arizona on the appeal from the judgment of the District Court certain errors were assigned as having been committed by said District Court as hereinafter particularly set forth, but said Supreme Court affirmed the ruling of said District Court as to each and all of said errors so assigned, and the action of said court in affirming said judgment and said various rulings of the District Court so assigned as error was in each instance erroneous and the same is now hereby assigned as error.

The various rulings in said District Court, the affirmance
133 of which is now complained of as erroneous, are specified as follows, to-wit:

Assignment of Errors.

(Title of Court and Cause.)

Now comes the said defendant, and having heretofore duly appealed to the Supreme Court of said territory from the judgment herein rendered, and alleges that manifest error occurred in the trial of said action, as shown by the record of the same, and that such errors in particular are as follows, viz:

I.

The court erred in denying the motion made by the defendant at the conclusion of all the testimony, to instruct the jury to return a verdict for defendant.

II.

The court erred in denying the motion for a new trial made upon the ground that the evidence did not sustain the verdict or judgment.

III.

The court erred in refusing to submit to the jury the following special interrogatories, viz:

1.

Was the method of throwing in the cars detached from the engine adopted by the conductor on the occasion of the accident, the usual and customary method of doing such work?

134 2.

Was the method of throwing in the cars a reckless and unsafe method?

3.

Was the adoption by said conductor of said method on this occasion the proximate cause of the accident to Lyon?

4.

Was the conductor Rigg guilty of gross negligence in the manner in which he ordered the work to be done?

There was no conflict of evidence whatever upon any of these points and the jury must inevitably have answered accordingly. Such answers would have controlled the general verdict, and prevented injustice being done through passion or prejudice.

IV.

The court in ruling upon the application for the special questions referred to in the preceding assignment, erred in demanding as a condition of granting such request, that the defendant should consent to the substitution of the word "sole" for "proximate" as used in question number 3. The effect of this ruling was to deprive the defendant of the benefit of that very principle so strongly upheld by the Supreme Court in reversing the former judgment.

The remark of the court in this connection, that the jury might not understand the word "proximate" and suggesting "sole" instead, was a distinct intimation to the jury that the court
135 regarded the two words as practically synonymous.

V.

The court erred in giving the oral charge to the jury, and particularly the following paragraphs thereof:

"If, however, the accident was caused by a failure of the defendant company to provide a reasonably safe place to perform the work

in which the man who was killed was engaged, then the defendant company is liable in damages for the death, if it was negligent in not providing such safe place."

This is not a correct statement of the law. The defendant was only bound to use reasonable care in providing a safe place. The distinction is important as applied to the facts of this case.

"If you find that this accident was caused solely by the action of the conductor in the method which he employed in putting cars on the spur at the time in question, then you should find a verdict for the defendant company, and you should not award any damages to the plaintiff in this case; or if you should find that the dead man has through his own negligence brought about this accident or contributed to it, then you should find for the defendant, and you should not award any damages in this case.

"If you find the accident was brought about solely by the acts of the conductor, you should not award damages. If the acts of the conductor alone did not cause the accident, but the accident was contributed to by the negligence of the defendant company by not
providing a safe place to work, then you should award
136 damages."

"In determining this case, gentlemen, you should take into consideration all the evidence in the case. You are the sole judges of the evidence, of the weight to be given it, and of the credibility of the witnesses; and from the evidence before you, you should determine these questions:

"First: Was the place where the deceased was working a reasonably safe place for the performance of the work to be done there—a reasonably safe place considering the character of the work to be done and the character of the premises?

"Second: If you find it was not reasonably safe, and the defendant company was negligent in that respect, did that fact have anything to do with the accident, or was it caused by the negligence of the conductor of the train alone?"

In these passages above quoted the court emphatically states that to relieve the defendant from liability, if at all negligent, the jury must believe the accident was due solely to the negligence of the conductor. The theory of the defense, already upheld by the Supreme Court, and by innumerable authorities, is that the company is not liable, though negligent, if the primary or proximate cause was the act of the fellow servant.

It is true that in other portions of the charge the principle is stated correctly, but the passages above quoted are stated as complete propositions and could be and were used as such in
137 the argument to the jury. Again, the court having previously defined proximate as being equivalent or nearly so, to "sole" the jury naturally construed the charge as a whole to mean as in the proposition above quoted.

VI.

The court erred in denying the motion to strike out the paragraph of "plaintiff's reply" beginning with the word "second." This para-

graph (Ab. folio 56) set up as a reply to the defense of assumption of risks, the claim that deceased was inexperienced; but the law is that when he entered the service he assumed to understand the risks. The court emphasized the error by modifying instruction (Ab. folio- 363, 364) by inserting the clause "And knew the danger, if any, incident thereto."

This modification is also assigned as error.

VII.

The court erred in the modification of the next instruction. (Ab. fol. 365.) The evidence was absolutely uncontradicted that the conductor on this occasion adopted an unusual and unsafe method, that he knew it was unsafe and contrary to custom, and was grossly careless in what he did. And yet the court by its modification submitted these questions to the jury.

VIII.

The court erred in refusing instruction (Ab. fol. 374.) This instruction reads as follows:

138 "Although the jury may believe from the evidence that the appliances furnished by the defendant company were defective as alleged by the plaintiff, yet if the jury further believe from the evidence that the conductor was negligent in the manner in which he conducted the work on this occasion, and that such negligence of the conductor was the proximate cause of the accident, without which such accident would not have happened, then the jury should find for the defendant.

"If there was negligence on the part of the defendant as alleged, that fact would not render the defendant liable if a new independent cause intervened, without which the accident would not have happened."

The above instruction stated exactly the principle upon which the defense was made. Nowhere else had the principle been clearly and unequivocally stated to the jury. The refusal, however, was consistent with the judge's oral charge and emphasized the error therein committed.

IX.

The court erred in refusing the following request for instruction: (Ab. fol. 376.)

The test by which the safety of machinery and appliances in any given employment is, that they are the same as are commonly used by persons engaged in like business, and if you believe from the evidence in the case that the machinery and appliances of the defendant are such as are commonly used by other railroad companies in Arizona engaged in the same business and for similar purposes, then I instruct you, that you will find for the defendant in this action.

This instruction is entirely consistent with the definition of negligence contained in the oral charge, viz: the failure to use such care

as a person of ordinary prudence would use under like circumstances. The same instruction had been given twice before by two
139 different judges of this court. Authorities will show it to state the law correctly.

X.

The court erred in permitting, against objection of defendant, each of the following named witnesses to testify as an expert, and to give to the jury his opinions to the safety of the appliances in use, viz: A. W. Sydour, M. F. O'Conner, W. A. Golder, James Hartington, J. A. Russell. None of these witnesses claimed to have the least experience in planning or constructing such appliances. It would have been negligence *per se* for the railroad company to employ any of these men to plan any railroad constructed.

Wherefore the defendant and appellant prays that said judgment may be reversed.

FRANK W. BURNETT,
Attorney for Defendant and Appellant.

(Endorsed:) No. 857. In the Supreme Court, Territory of Arizona, Gila Valley, Globe & Northern Railway Company, Plaintiff in Error *vs.* A. J. Lyon, Defendant in Error. Assignment of errors. Filed May 26, 1905. S. M. Cullom, Clerk.

140 In the Supreme Court of the Territory of Arizona.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,
vs.
A. J. LYON, Appellee.

Supersedeas Bond.

Know all men by these presents that we, Gila Valley, Globe & Northern Railway Company, a corporation duly organized and existing under the laws of the Territory of Arizona, and Gust. A. Hoff and L. H. Manning are held and firmly bound unto the above named A. J. Lyon in the sum of $12,000, to be paid to the said A. J. Lyon. For the payment of which well and truly to be made we bind ourselves and each of us, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with out seals and dated the 27 day of May 1905.

Whereas, the above named Gila Valley, Globe & Northern Railway Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the Supreme Court of the Territory of Arizona.

Now, therefore, the condition of this obligation is such that if the above named Gila Valley, Globe & Northern Railway Company shall

prosecute said writ of error to effect and answer all damages
141 and costs if it fails to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY,
By EPES RANDOLPH, *President.*

Attest:
A. C. LAIRD,
Secretary.

(Corporation Seal.)

GUST. A. HOFF. [SEAL.]
L. H. MANNING. [SEAL.]

TERRITORY OF ARIZONA, *County of Pima, ss:*

The above named Gust A. Hoff and L. H. Manning appeared before me this 27 day of May 1905, and acknowledged the execution of the foregoing bond, and also each of the said parties upon oath stated that he was worth, over and above the amount exempt from execution, the amount of the penalty of said bond.

[SEAL.] JOSIE B. HENDERSON,
Notary Public.

Approved:
RICHARD E. SLOAN,
Presiding Justice.

(Endorsed:) No. 857. In the Supreme Court of the Territory of Arizona. Gila Valley, Globe & Northern Railway Company, Appellant, *vs.* A. J. Lyon, Appellee. Supersedeas bond. Filed June 1st, 1905. S. M. Cullom, Clerk.

142 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 30th day of March, A. D., 1905, the same being one of the regular juridical days of the January Term, A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 857.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,
vs.
A. J. LYON, Appellee.

This cause having been heretofore submitted and by the Court taken under consideration, and the Court having considered the

same and being fully advised in the premises: It is ordered that the judgment of the Court below be and the same is hereby affirmed.

It is further ordered, adjudged and decreed, that A. J. Lyon, the Appellee herein, do have and recover of and from the Gila Valley, Globe & Northern Railway Company, Appellant herein, and J. N. Porter and Geo. W. P. Hunt, sureties on Appeal Bond, the sum of Five thousand dollars, ($5,000.), amount of Judgment entered in the District Court, with legal rate of interest thereon from date of rendition of said judgment, together with her costs in this
143 court taxed at two-hundred sixty-two and 5/100 ($262.05) dollars, and her costs in the lower court in this cause incurred.

And afterwards and upon to-wit the 25th day of May, A. D., 1905, the same being one of the regular juridical days of the January Term, A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 857.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,
vs.
A. J. LYON, Appellee.

It is ordered that the Motion for Rehearing, filed herein by Appellant, be submitted.

And afterwards and upon to-wit the 26th day of May, A. D. 1905, the same being one of the regular juridical days of the January Term, A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 857.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Appellant,
vs.
A. J. LYON, Appellee.

It is ordered that the Motion for Rehearing, filed herein
144 by Appellant, and heretofore submitted, be and the same is hereby denied.

145 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the printed copy of the Abstract of Record contained herein, is a full, true and correct copy of the Abstract of Record filed in said cause; that the foregoing typewritten pages, numbered from 101 to 144 inclusive, are full, true and cor-

rect copies of the Stipulation; Opinion; Opinion rendered on first appeal; Petition for Rehearing; Affidavit of Frank W. Burnett; Petition for Writ of Error; Assignment of Errors; Supersedeas Bond; and all orders and proceedings of said Court had and entered of record in a certain case lately pending in said Court wherein the Gila Valley, Globe & Northern Railway Company, a corporation, was Appellant and A. J. Lyon was Appellee, as the same remain of record and on file in my office.

I further certify that the writ of error and citation attached hereunto are the original Writ of Error and Citation issued by said Supreme Court of the Territory of Arizona in said above entitled cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona, this 19th day of July, A. D., 1905.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.
By ANGIE B. PARKER, *Deputy.*

146 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Arizona, before you, or some of you, between Gila Valley, Globe & Northern Railway Company, plaintiff in error, and A. J. Lyon, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, Gila Valley, Globe & Northern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26 day of May, in the year of our Lord one thousand nine hundred and five.

S. M. CULLOM,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed by
RICHARD E. SLOAN,
Presiding Justice.

147 [Endorsed:] No. 857. Gila Valley, Globe & Northern Railway Co., Plaintiff in Error, *vs.* A. J. Lyon, Defendant in Error. Writ of Error. Filed May 26, 1905. S. M. Cullom, Clerk. Frank W. Burnett, Attorney for Plaintiff in Error.

148 TERRITORY OF ARIZONA, *County of Gila, ss:*

Chas. T. Martin being first duly sworn, on oath deposes and says: I am a citizen of the United States, over twenty one years of age; that on the 31st day of May, A. D. 1905, I served the Annexed Citation upon George R. Hill, Esq., one of the attorneys for Defendant in Error, by delivering to him a copy of said Citation at Globe in Gila County, Arizona Territory; that I am not related to any of the parties to the suit, and that I have no interest therein, either direct or indirect.

CHAS. T. MARTIN.

Subscribed and sworn to before me this 9th day of June, 1905.

[Seal District Court, Fifth District, Gila Co., Arizona.]

GEORGE H. SMALLEY,
Clerk District Court Gila County, Arizona Territory.

149 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To A. J. Lyon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the Second Monday of October Nineteen Hundred and Five, pursuant to a writ of Error filed in the Clerk's office of the Supreme Court of the Territory of Arizona, wherein the Gila Valley, Globe & Northern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 26th day of May, in the year of our Lord One Thousand Nine Hundred and Five.

RICHARD E. SLOAN,
Presiding Justice of the Supreme Court of the Territory of Arizona.

The undersigned, Attorney for said defendant in error hereby acknowledges service of the foregoing citation upon this — day of — 1905.

——— ———,
Attorney for A. J. Lyon, Defendant in Error.

150 [Endorsed:] No. 857. Supreme Court of the Territory of Arizona. Gila Valley, Globe & Northern Railway Company, Plaintiff in Error, *vs.* A. J. Lyon, Defendant in Error. Citation. Filed June 14th, 1905 S. M. Cullom, Clerk.

Endorsed on cover: File No. 19,869. Arizona Territory supreme court. Term. No. 367. Gila Valley, Globe & Northern Railway Company, plaintiff in error, *vs.* A. J. Lyon. Filed August 5th, 1905. File No. 19,869.

FILE COPY.

Supreme Court of the United States.

October Term, 1906.

No. 96.

Office Supreme Court, U. S.
FILED.
OCT 30 1906
JAMES H. McKENNEY,
CLERK

Gila Valley, Globe and Northern Railway Company,
Plaintiff in Error,
vs.
A. J. Lyon,

Opening Brief of Plaintiff in Error.

FRANK W. BURNETT,
Attorney for Plaintiff in Error.

Parker & Stone Co., Law Printers, 331 New High St., Los Angeles, Cal.

Supreme Court

OF THE

United States

October Term, 1906.

No. 96.

Gila Valley, Globe and Northern Railway Company,
Plaintiff in Error,

vs.

A. J. Lyon,

OPENING BRIEF OF PLAINTIFF IN ERROR.

Kent, C. J., of the court below on the first appeal stated the facts as follows: [Tr. p. 31.]

"This was an action brought by the appellee for damages for injuries resulting in the death of her son, alleged to have been brought about by the negligence of the defendant railroad company, the appellant in this court. The case was tried before the court and a jury.

The facts adduced upon the trial showed that the defendant, a railroad company, to accommodate the business of a certain mine near Globe,

in this territory, built a sidetrack several hundred yards long, running from the main track for some distance up a steep grade and near the top of the grade branching into two spurs. At the top of the grade, and where the ground began to be level, these tracks passed under a shed, a structural part of the mine company's plant, for about 30 feet. On ordinary freight box-cars passing under the shed brakemen were compelled to stoop or sit down because of the nearness of the top of the car to the roof of the shed. Beyond the shed the tracks were extended upon a trestle about 110 feet long and designed for the placing of cars for convenience of loading and unloading at the mine. At the end of this trestle the tracks stopped on the edge of a steep ravine or canyon. In order to place and leave cars on this spur or sidetrack, there being but one connection with the main track, the engine could not go in in advance, but the cars had to be pushed up this spur, and, as the incline was steep leading from the main track, with a small engine some speed was at first required in order to reach the top of the incline. At the place where the steep grade ceased the shed referred to spanned the track in such a way as to cut off the view between those on the engine and the far end of a train pushed up the incline on the sidetrack. The roof of the shed was so low as to make it difficult to use hand-brakes on the cars while passing through the shed. There was no obstruction placed at the end of the track, and trestle which would prevent the cars from going beyond the track, and falling into the ravine, except a piece of pine timber of a size 12x12 inches, bolted at each end and screwed to the ties, rising to a height above the rails of 10 or 12 inches. The object of this timber was not to serve the purpose of what is known as a "bumping-post", and the timber was not sufficient to arrest the motion of cars propelled at even a comparatively slow rate

of speed, but was placed there primarily to prevent cars that were stationary, on the track and that might become loosened by accident or otherwise, from running off the track at the end, and was sufficient for that purpose. The decedent was employed by the defendant company as a brakeman and had been in its service for about twelve days when he met his death; and during that time he had been frequently on the premises in question engaged in his duties as a brakeman, but it was not shown that prior thereto he had had experience in the duties required of him. Under ordinary circumstances, in switching cars onto this sidetrack, it was proper and usual to keep the engine attached to the cars until they were stopped at the desired position. At the time of the accident in question, instead of adopting the usual method, the conductor of the freight train upon which the decedent was employed adopted the unusual method, while the train was in full motion, of cutting off two cars from the rest of the train, which was being pushed by the locomotive, intending to let them go in on the sidetrack by their own momentum and with the aid of the deceased, who was on the front car, stop them by means of the hand brakes when they had attained the desired position. When the cars were cut off the train they were going at a rate of speed estimated by some witnesses as great as six miles an hour. After they had passed through the shed they were still going at such a rate of speed that the deceased and the conductor, who was on the last car, were unable to control them and the forward car, upon which the deceased was riding, knocked the pine barrier from its position and was precipitated with the deceased into the ravine, and the deceased was immediately killed.

"There was nothing to show that the deceased was aware of the purpose of the conductor to cut the cars loose from the train, or that, although

the deceased knew the premises, he had had sufficient experience either to be aware of the danger of the premises or to be chargeable with the knowledge of the dangers as a matter of law. Testimony was offered by the defendant to show that the premises were reasonably safe when used in a proper manner; and by the plaintiff to show that they were dangerous, not only when used in a reckless manner, but dangerous even when the work was performed with due care. The evidence however, tended to show that if the cars had been put in on the side-track in the usual manner, that is, by being attached to the engine with the use of air-brakes until the cars had attained the position desired, the accident and injury would not have occurred; and that the accident was brought about by the method adopted by the conductor of the train in cutting off the end cars and sending them up on the side-track without the control of the engine. It appeared, also, that this unusual method had been resorted to once or twice before by the conductor, but that the ordinary custom, known to the conductor, who was an experienced man, was to "spot" the cars by means of the engine.

"The court denied the motion of the defendant to instruct the jury to return a verdict for the defendant and the jury returned a verdict for the plaintiff in the sum of $5,000."

The first judgment was reversed, and on the second trial a verdict was again rendered against plaintiff in error for $5,000, for which amount and accrued interest the Supreme Court of Arizona on the second appeal rendered judgment against the plaintiff in error, on which judgment this writ of error is prosecuted.

(If jurisdiction is questioned, see Benson Mining Co. v. Alta M. Co., 145 U. S. 428; Guthrie N. Bk. v. Guthrie, 173 U. S. 528.)

All the questions are raised by exceptions to rulings of the trial court, and the errors assigned intended to be urged here are:

I.

The court erred in refusing to instruct the jury to find a verdict for plaintiff in error. [Tr. p. 35.]

II.

The court erred in its ruling and in its charge that plaintiff in error was liable unless the jury found that the negligence of the conductor was the sole cause of the accident. Thus ignoring the doctrine of proximate and remote causes.

A statute of Arizona empowers the court to submit special questions to the jury answerable yes or no. Plaintiff in error submitted the following:

"I. Was the method of throwing in the cars, detached from the engine, adopted by the conductor on the occasion of the accident, the usual and customary method of doing such work?

"II. Was said method of throwing in the cars a reckless and unsafe method?

"III. Was the adoption by said conductor of said method on this occasion the proximate cause of the accident to Lyon?

"IV. Was the conductor Riggs guilty of gross negligence in the manner in which he ordered the work done?" [Tr. p. 36.]

"Thereupon the court denied said request, and in so doing stated as follows:

The Court: "Mr. Burnett, you have submitted here some four special interrogatories to be submitted to the jury. The court is somewhat in doubt as to the propriety of submitting any interrogatories in a case of this kind, but I have concluded to submit them as desired, except that I am unwilling to submit the third interrogatory as submitted by you, because I fear that the jury may misunderstand the use of the word 'proximate' and may be misled thereby in attempting to answer the question. I am willing to submit this question by the substitution of the word 'solely' for the word 'proximate', not intending thereby in any way—indicate that the use is not proper as specified by you in the third interrogatory, but only that the jury may be misled by the word 'proximate', and the word 'solely' is the nearest word to fit the case that I can think of. If you have any other word that you prefer to use, which would be proper under the circumstances, I will consider your suggestion."

Mr. Burnett: "Note an exception for the defendant to the ruling on the matter."

The Court: "I don't understand what you mean by your exception. Do you mean you wish me not to submit it in the form I suggest, or do you prefer to have it submitted in the form I suggest, rather than not to have it submitted at all?"

Mr. Burnett: "I object to any submission to the jury of any question or proposition which holds or requires the finding on their part that the company is liable unless the negligence of the conductor was the sole cause of the injury."

The Court: "Under your view of the case, I will refuse to submit any question to the jury."

Mr. Burnett: "The defendant excepts to the ruling of the court."

This view of the court was further impressed upon the jury in the oral charge then given, a portion of which is as follows:

"If you find that this accident was caused solely by the action of the conductor in the method which he employed in putting cars on the spur at the time in question, then you should find a verdict for the defendant company, and you should not award any damages to the plaintiff in this case; or if you should find that the dead man has through his own negligence brought about this accident or contributed to it, then you should find for the defendant, and you should not award any damages in this case.

"If you find the accident was brought about solely by the acts of the conductor, you should not award damages. If the acts of the conductor alone did not cause the accident, but the accident was contributed to by the negligence of the defendant company by not providing a safe place to work, then you should award damages."

"In determining this case, gentlemen, you should take into consideration all the evidence in the case. You are the sole judges of the evidence, of the weight to be given it, and of the credibility of the witnesses; and from the evidence before you, you should determine these questions:

"First: Was the place where the deceased was working a reasonably safe place for the performance of the work to be done there—a reasonably safe place considering the character of the work to be done and the character of the premises?

"Second: If you find it was not reasonably safe, and the defendant company was negligent in that respect, did that fact have anything to do with the accident, or was it caused by the negligence of the conductor of the train alone?"

Each paragraph of the charge was excepted to at the time. [Tr. p. 37.] In a later portion of the charge the court correctly stated the proposition as contended for by plaintiff in error, and used the word proximate in so doing, yet having given the jury to understand that the word "proximate" meant the same as "sole", the jury was, of course, warranted in regarding this latter portion of the charge as simply a reiteration in other language of what the court had already told them.

The Supreme Court of Arizona on the second appeal [Tr. p. 45] so construed the charge and gave its decision on the assumption that in the connection used the word "sole" and "proximate" were synonymous.

The court says:

"It becomes important to determine whether this language of the charge implying that unless the negligence of the conductor was the sole cause of the injury, the defendant was liable, is inconsistent with the declarations of law laid down by us."

The trial judge also emphasized his meaning by refusal to grant requests made by plaintiff in error, and modifications of others which were given, all of which were excepted to [Tr. pp. 42 and 43.]

III.

The court erred in admitting the evidence of certain witnesses to testify as experts, and to give their opinion as to the safety of the appliances provided. The said witnesses not being civil engineers or railroad constructors or having any knowledge of that profession.

I.

The jury should have been instructed to render a verdict for the plaintiff in error.

The first question presented involves a review of the facts. I shall not undertake this at length here, but will content myself with challenging counsel for defendant in error to point out wherein the record contradicts any of the following conclusions:

There was a total lack of evidence to show any negligence on the part of the defendant. The court in the oral charge correctly defined negligence as follows:

"Negligence for the purposes of this case I define to be a failure to use such care as a person of ordinary prudence would use under like circumstances."

The evidence shows without contradiction, that the defendant did use such care as a person of ordinary prudence would use in providing the ap-

pliances in question. It procured the services of William Hood, the chief engineer of the Southern Pacific Railroad system to make the plans. These plans were approved by William Garland, Epes Randolph, Arthur G. Wells, and others shown to be eminent in their professions as civil engineers and designers of railroad tracks and appliances. It is undisputed that the appliances were constructed exactly as designed. It is also undisputed that these appliances are similar to those used by other railroads throughout the country under corresponding circumstances.

What greater care could one use than this?

It is also undisputed that for five years the appliances have been in constant use without injury to anyone except in this one instance when the conductor permitted the flagrant violation of duty by "kicking" the cars in detached from the engine.

In building structures of this class, to whom should the owner apply for instruction as to the manner of construction? To the members of the petit jury? Certainly not. To brakemen or conductors with no experience in building or designing such structures? It would be criminal negligence *per se* to entrust such matters to any of them.

The defendant did all that any prudent man could do or would do in providing these appliances

and there is absolutely no evidence in the record to the contrary.

The court should hold as a matter of law that the negligence of the conductor was the proximate cause of the accident. When, upon all the evidence, reasonable men can come to but one conclusion, the question should not be left to the jury.

The reading of the evidence irristibly leads to the conclusion that the flagrant negligence of the conductor caused the accident.

The evidence in the last trial presents but one point of conflict, not as to any fact, but in the opinions of so-called experts as to the safety of the premises. All witnesses in effect agree that the act of the conductor was the proximate cause.

For example: The leading witness for plaintiff, A. W. Sydour, who had worked at this place said: [Cross-Ex., p. 21.]

"Never knew of any other method being used, except spotting cars with the engine up there. Any other method would have been an unsafe method of doing the work, and would have *inevitably* caused accident, such as was caused here."

On the other hand there is the practical demonstration of safety in five years constant use, and the language of the Supreme Court of Arizona on the first appeal applies with peculiar force:

"It is the master's duty to provide a safe place to work, but that principle is not applicable when

the place becomes dangerous in the progress of the work, from the manner in which the work is done."

Among the cases which that court cited in support of the proposition is

Callaway v. Allen, 64 Fed. 297 (C. C. A.).

At page 300, that court says:

"But assuming that the superintendent had, by implication or otherwise, authorized it (i. e. the defective apparatus) still we think there can be no recovery. The primary cause of the action was the careless and negligent use of the car by Anderson (the foreman) and the men under him. The weight of evidence is clear that the car, with the added superstructure was not ordinarily or necessarily dangerous if carefully handled and not overloaded. Any machine may be made dangerous if wrongfully or negligently used. * * The timbers were too heavy for the counter-balancing weight and that was the fault of the co-employes and was the primary and controlling cause of the accident. * * * For these reasons the cause is remanded to the Circuit Court with direction to enter a decree in favor of the defendant."

The facts of the case cited and the language of the Court of Appeal are peculiarly applicable to the case at bar.

The court also cited on the same point:

C. C. & St. L. R. R. v. Brown, 73 Fed. 970;

Hussey v. Coger, 112 N. Y. 614;

Hagan v. Smith, 125 N. Y. 774.

The evidence of the conductor in charge [Riggs, Tr. p. 27] conclusively shows the accident would not have happened except for his own reckless conduct. He says:

"It is true if cars were placed upon that spur connected with the engine until so spotted or placed, the cars being connected to the engine by air brakes, that such operation is perfectly safe."

The evidence also clearly shows that the buffer was not put at the end of the track to stop cars in motion; also that the hand brakes were not intended to be used, and did not need to be used in stopping the cars, the power of the engine being all sufficient for that purpose so long as attached to the cars, so that when the operation was properly performed the matter of the "low shed", the "short track" and the "insufficient bumper" became immaterial.

"In this case the cars are put up there by the engine, with the engine attached. They don't depend on the hand brakes or buffers to stop them. It would not make any difference if there was a shed coming down too low for a man to stand on the cars." [Sydour, re-cross ex. 22, witness for defendant in error.]

I therefore submit that upon all the evidence, a verdict for the defendant below should have been directed.

Rendall v. B. & O. R. R., 109 U. S. 478.

II.

Exceptions to charge that negligence of conductor must have been the sole cause of the accident to relieve plaintiff in error from liability.

The question raised under the second assignment is stated and decided by Kent, C. J., on the first appeal [page 55]. An instruction had been asked to the effect if the jury believed from the evidence that the proximate or primary cause of the accident was the negligence of the servant Rigg, that there could be no recovery.

The trial court modified the instruction by inserting: "And was not coupled with any negligence on the part of the defendant company." Kent, C. J., after referring to the main charge as covering all of the questions of concurring or co-operating cause, says:

"In the main charge given, the court does not discuss the question of proximate cause, nor, except as above stated, was the question presented to the jury whether if such negligence of the conductor, who it is admitted was the fellow servant of the deceased, was the direct or proximate cause, the defendant could still be held liable if in any way at fault."

"We think the court overlooked the effect of this instruction as so modified, in its relation to the freedom from liability of the defendant if the negligence of the fellow servant was the proximate cause. If the act of the conductor was the proximate cause of the injury, then it made no difference with respect to the freedom from lia-

bility of the defendant, as a matter of law, whether the negligence of the conductor was or was not coupled with the defendant's negligence. It is, of course, well settled that if the injury was caused both by the negligence of the fellow servant and the negligence of the master, then the master is liable; his negligence is then a contributory or co-operative cause for which he is liable.

R. R. Co. v. Cummings, 106 U. S. 700;
Elmer v. Locke, 135 Mass. 575;
A. T. & S. F. Ry. v. Larmigan, 42 Pac. 343.
Morrisey v. Hughes, 27 All (Ver.) 205.

"But when the proximate cause of the injury is the negligence of a competent fellow servant no recovery can be had, even though the place or appliances are defective and the master is negligent in that respect; and whether such negligence of the fellow servant was the proximate cause or whether the defendant's negligence was a contributory cause is ordinarily a question for the jury."

"Wood on Master & Servant, 812;
Vizelich v. So. Pac. Co., 126 Cal. 587;
Trewatha v. Buchanan, G. M. & M. Co., 28 Pac. (Cal.) 571;
S. P. Co. v. Yergin, 109 Fed. Rep. 436;
Whitman v. Ry. Co., 17 N. W. (Wis.) 124;
C. N. O. & T. P. Ry. v. Mealer, 50 Fed. Rep. 725;
M. & S. P. Ry. Co. v. Kellogg, 94 U. S. 469;
Norfolk & W. Ry. Co. v. Brown, 22 S. E. (Va.) 496;
Edmondson v. Kent, Central Ry. Co., 49 S. W. (Ken.) 200;
Ariz. Lumber & Timber Co. v. Mooney, 42 Pac. (Ariz.) 952;
Little Rock & M. R. Co. v. Baxiy, 84 Fed. Rep. 944.

"It is the matser's duty to provide a safe place to work, but that principle is not applicable where

the place becomes dangerous in the progress of the work from the manner in which the work is done, or is made dangerous only by the carelessness and neglect of fellow servants.

C. C. & St. L. R. R. v. Brown, 73 Fed. Rep. 970;
Hussey v. Coger, 112 N. Y. 614;
Hogan v. Smith, 125 N. Y. 774."

All, or nearly all of the authorities cited by the court fully sustain the opinion and this is all that I am contending for here. The cases thus cited are among those now relied upon and represent a part of the cases that were cited by counsel for plaintiff in error in the Arizona court.

On the second appeal, however, the same court took the position that "proximate" cause and "sole" cause were synonymous and sustained a charge to that effect. [Tr. p. 45.]

The question thus presented is of very great importance and I believe has not yet been directly decided by this court. As shown by the quotations from the opinion of Justice Kent, the Cummings case and those following it refer to concurring causes and do not touch the question of proximate cause.

Very many decisions in addition to those cited by Justice Kent hold that if the negligent act of a fellow servant is the proximate cause of an injury there can be no recovery even if the defendant had not done all that could be done to provide against the consequences of such negligence.

To illustrate: An engineer wrongfully disregards an order to wait at a certain station for the passing of an in-coming train; he goes ahead, causing a collision and his fireman is thereby injured. To his suit the railroad company naturally sets up the defense that the injury was caused by the wrongful act of the engineer. To this the fireman answers that the train was not equipped with the most approved pattern of air brakes. That although the brakes were adapted for the purpose to which they were intended, yet they were not sufficient to stop a heavy train in time to prevent an impending collision,etc.

Under the rule adopted by the court below on the second appeal, the jury finding the negligence of the engineer to be the proximate or efficient cause, could still render a verdict for the plaintiff and comply with the charge given.

The following, from the opinion of Henshaw, J., in the Supreme Court of California in Vizelich v. So. Pac. Co., 126 Cal. 587, is peculiarly in point:

"In this discussion it will be assumed that the plaintiff satisfactorily established his relationship to the company as its employee and it will further be assumed that the evidence was sufficient to show that the water tank of the engine was insecurely fastened.

"The case, then, is one where an employee seeks to recover for personal injuries sustained by him by reason of the defective condition of the appliances furnished to him by the employer. In

such cases he can recover only when the defective machinery or appliances was the *proximate* cause of the injury. Ordinarily, this question is one of fact for the jury under proper instructions, but where the facts are not in dispute it may become a question of law for the court. If the question is debatable, one upon which reasonable minds may take opposing views, it should, of course, be submitted to the jury, but where it is clear and unmistakable that the proximate cause is one other than that upon which the right of action rests, it is for the court so to declare.

"In this case it appears without conflict that the proximate cause of the injury was the negligence of the fellow employee who misplaced the switch and caused the collision. The case is paralleled by that of Trewatha v. Buchanan, etc., Co., 96 Cal. 494.

"Even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause of the injury is the negligence of a fellow servant no recovery can be had. (Wood on Master and Servant, 812.)

"It is well settled that if injury has resulted in consequence of a certain unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damages to the last or proximate cause, and refuse to trace it to that which was more remote. (Cooley on Torts, 2nd ed., p. 73.)

"We leave the realm of certainty and enter upon that of conjecture when we seek to go behind the proximate cause, and to inquire as would become necessary in this case, whether the company should have secured the water tank so as to withstand a collision; whether, if fastened with

ordinary security, it would have withstood the shock of this particular collision; and other questions of like uncertainty which readily present themselves. Yet, notwithstanding that it so convincingly appears that the approximate cause was the negligence of the switchman, and notwithstanding the further fact that the utmost to which plaintiff could contend, that he was entitled by way of instruction to the jury upon this question, would be a charge to the effect that as they determined the proximate cause of the injury to be the negligence of a fellow employee, or the defective appliance, so should their verdict be either for defendant or plaintiff, the court, in fact, went much further than this, and positively instructed the jury that, if they found that the defendant failed to provide a suitable road bed and an engine properly equipped with a tank securely fastened, and that if this failure was the cause of the injury to plaintiff, they must find in plaintiff's favor, 'notwithstanding the fact that the brakeman, a fellow servant, was guilty of negligence in leaving the switch described as switch B, open.' By this instruction the jury was, in effect, charged that, if injury resulted by reason of the defective appliance, the defective appliance itself, as matter of law, became the proximate cause."

In the case of Little Rock v. Barry, 84 Fed. Rep. 944, 56 U. S. Ap. 36, the court concludes its opinion as follows:

"It was the gross negligence of the servants, which no one could anticipate, that constituted the intervening and *proximate* cause, without which this collision could never have been; and it is to them, and not in the failure to give the notices, in our opinion, that this accident must be attributed, under the maxim, *'causa proxima, non remota, spectatur.'*"

When the conductor in this instance, in disregard of all rules and custom, and in disregard of the evident danger of such a course, threw these two cars on to a short spur detached from the engine at a speed of six miles an hour he was guilty of wanton, if not criminal negligence. Was the railroad company bound to anticipate and provide against the consequence of such negligence, and if so, was its failure to so provide, a remote and not a proximate cause of the accident?

In the illustration above given, if the engineer wrongfully disregarded orders to wait at the siding for another train, with the consequent injury to the fireman, it cannot be said that the act of the engineer was the sole cause of the injury for it could be shown perhaps, that after the danger became apparent, the train might have been stopped in time to prevent the collision if the air brakes had not failed, or if air brakes of a more powerful pattern had been in use on the train, and therefore in the suit by the fireman for damages against the company, after a charge such as was given, the jury would be bound to find the company liable for the reason that the negligence of the engineer was not the sole cause. They might believe that the train could have been equipped with more efficient brakes, and that would be a cause also, but a remote one, and one for which the company could not be held liable under such circumstances. The brakes were sufficient for all

purposes except as against wrongful or gross negligence of the fellow servant, and as to such negligence common experience teaches that there is no appliance or aparatus in use that is free from danger.

As another illustration, take the case cited from California, (Vizelich v. So. Pac., 126 Cal. 587). A servant in this case misplaced a switch and a fellow servant was injured in the collision which followed, by being struck by the water tank of the engine which was torn loose by the shock. It was shown that the tank was insecurely fastened and under the instruction given by the trial court, a verdict was found against the railway company for its negligence in that respect. The Supreme Court, however, holds that the insecure fastening of the tank was only a remote cause and that at the very least the question as to proximate cause should have been submitted to the jury.

It is very evident in that case, if the jury had been instructed that they must find for the plaintiff unless they believed that the negligence of the fellow servant was the sole cause of the accident, that they must have found for plaintiff for it is true that the tank might have been so fastened as to withstand the shock of that particular collision.

If the negligence of the plaintiff, or his fellow servant is the sole cause of an injury, it needs no examination of the law books to hold that there would be no recovery. The fact is self-evident

and cannot be questioned and probably never was questioned.

Is it not true, that there is not, and never was a sole cause of anything, unless it be the First Cause of all things?

The discovery of the mine on the mountain side; the building of the railway, etc., etc., are all remote causes of the injury.

I am wholly unable to conceive of a case in which an action is brought by an employee against his employer for an injury incurred in the use of machinery when a recovery could not be had under the rule adopted here, no matter what negligence on the part of the fellow servant could be shown, for in every such case it is possible to show some lack of perfection in detail or some possible improvement in the construction of the apparatus which would warrant the jury in holding that the negligence of the fellow servant was not the sole cause of the injury. In fact, it must be self-evident that no one act can ever be the sold cause; and if the act of defendant, as in the case of the water tank on the engine, is something for which the defendant should not be held liable under the circumstances of that accident, then the jury should not be told to find for plaintiff unless the negligence of the fellow servant was the sole cause; such a charge in every conceivable case, *compels* a verdict for plaintiff.

In the opinion on the second appeal the court cites but one case on this point:

Kraut v. Frankfort, 160 Pa. Sta. 327,

and how far from sustaining the court is this, is shown by the following extract from the opinion:

"The unusual speed of the car and the defective crossing were both factors and as the defendant was responsible for both it is useless to speculate as to which was the remote and which the proximate cause."

In Wharton on Negligence, 2nd Ed., Sec. 85, the author says:

"What is the cause of a given phenomenon? The necessitarian philosophers, who treat all the influences which lead to a particular result as of logically equal importance, and who deny the spontaneity of the human will, tell us that the cause is the sum of all the antecedents. Thus, for instance, a spark from the imperfectly guarded smoke pipe of a locomotive sets fire to a hay stack in a neighboring field. What is the cause of this fire? 'The sum of all the antecedents', answers Mr. Mill, the ablest exponent of the necessitarian philosophy. Apply this concretely, and it would be difficult to see how any antecedent event can be excluded from taking a place among the causes by which the fire in question is produced. Certainly, we must say that either if the railroad in question had not been built (an event depending upon an almost infinite number of conditions precedent, among which we may mention the discovery of iron, steam and coal), or the haystack in question had not been erected (to which there is also almost an infinite number of necessary antecedents, the failure of any one of which would have involved the failure of the haystack), no fire

would have taken place. Jurisprudence, however, does not concern itself with refinements such as these. Its object is to promote right and redress wrong."

"The question, therefore, when an injury is done, is whether there is any responsible person who could, if he had chosen, have prevented it, but who, either seeing the evil consequences, or negligently refusing to see them, has put into motion, either negligently or intentionally, a series of material forces by which the injury was produced. This is the basis of the distinction between conditions and causes. We may concede that all the antecedents of a particular event are conditions without which it could not exist, and, that, in view of one or another physical science, conditions not involving the human will may be spoken of as causes. But, except so far as those conditions are capable of being molded by human agency, the law does not concern itself with them. Its object is to treat as causes only those conditions which it can reach, and it can reach these only by acting on a responsible human will."

Quoted with approval by Court of Appeal in
Zophi v. Postal Tel. Co., 60 Fed. Rep. 987.

Please consider the uncontradicted evidence in this case, that the conductor, Riggs, wilfully and recklessly threw these cars on to the spur in such manner as must inevitably have caused the accident, and then apply the language above used.

"The question is, whether there is any responsible person who could, if he had chosen, have prevented it, but who, either seeing the evil consequences, or negligently refusing to see them, has put into motion, either negligently or intelli-

gently, a series of material forces by which the injury was produced?"

In addition to the cases already cited including those quoted from the opinion on the first appeal as sustaining the position of the plaintiff in error, are the following:

Evansville R. R. Co. v. Henderson, 134 Ind. 636; 33 N. E. 1021;

Allen v. N. Gas Co., L. R. 1 Exch. Div. 251; 45 L. J. Exch. N. S. 668; 34 L. T. N. S. 541;

Conger v. Flint R. R., 86 Mich. 76; 48 N. W. 695;

Kevern v. Providence G. & S. M. Co., 70 Cal. 392; 11 Pac. 740;

Whitman v. Wisconsin & M. R. Co., 58 Wis. 408; 17 N. W. 124;

Course v. N. Y. L. E. & W. Ry. Co., 17 N. Y. S. R. 715; 2 N. Y. Supp. 312;

N. O. & T. P. R. Co. v. Mealer, 50 Fed. 725;

Grover v. Harley, 53 Fed. 983;

Morris v. Duluth S. S. Co., 108 Fed. Rep. 749;

Norfolk & W. Ry. Co. v. Brown, 91 Va. 668; 22 S. E. 496;

Bull v. Mobile & M. R. Co., 67 Ala. 206;

Rose v. Gulf, & C. R. (Tex.), 17 S. W. 789;

New York, &c. R. R. v. Perriguey, 138 Ind. 414; 37 N. E. 976;

Union Pac. R. R. v. Callaghan, 56 Fed. 988;
St. Louis, &c. R. R. v. McLain, 80 Tex. 185; 15 S. W. 789;
A. T. & Santa Fe v.—— 56 Kan. 109;
Broughel v. So. N. E. Tel. Co., 77 Con. 617;
Edmondson v. Ky. Cent. Ry. Co., 49 S. W. 200;
Youngbluth v. Stephenson, 104 Wis. 343;
Holland v. Tennessee Coal Co., 91 Ala. 445.

21st American and English Encyclopaedia of Law, second edition, page 483, cites hundreds of cases to the same point.

III.

Expert Evidence.

No claim was made by defendant in error that the premises of plaintiff in error were out of order, or not as designed to be constructed. The complaint made is as to the planning or designing of the structure. There is no evidence in the record that the structure was not well designed so as to constitute a reasonably safe place to work, except the opinions of an ex-brakeman and ex-conductor to the effect that they were not reasonably safe. [Tr. pp. 20, 23 and 24.]

These witnesses were challenged on the ground that they had had no experience as civil engineers or railroad constructors, and certainly they were not competent to undertake the building of such

or similar structures, why then should they be competent to advise a jury as to the work of men thoroughly versed in their profession?

In the case of Ballard v. N. J. Lake Erie & Wes. Ry. Co., (Pa. 19 Atlantic Rep. 35), a question was asked of a brakeman of years experience as to his opinion of certain railroad appliances. The court said:

"It was shown that Brown was not a civil engineer nor a railroad builder, and was not acquainted with railroad construction."

The court ruled that he was not competent to testify as an expert, and if this so-called expert evidence was eliminated here, there is nothing to support the case for the defendant in error. There is no dispute as to the facts. The structure was planned and approved by eminent civil engineers and railroad constructors [Tr. pp. 28, 30, 32] and five years of successful operation without accident (except this instance), had demonstrated the safety of these appliances when used according to the rule, or custom which prevailed, and had always prevailed, except at the time of this injury when the conductor, who admits that he knew better, but was in a hurry adopted the murderous method which, according to the witness Sydour, inevitably resulted in the killing of his fellow servant.

Respectfully submitted,

FRANK W. BURNETT,

Attorney for Plaintiff in Error.

FILE COPY.

No. 96.

[redacted]

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JAMES H. McKE

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

GILA VALLEY, GLOBE, AND NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

A. J. LYON, DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR

WATERS DAVIS,
Attorney for Defendant in Error.

In view of the rules of this court, which permit plaintiff in error to file its brief so near the date of submission that counsel for defendant in error, at El Paso, Texas, may be unable to reply thereto, it becomes necessary to anticipate the brief of plaintiff in error, and I shall endeavor, hereby, to reply to such argument as may be made under the various assignments of error filed herein.

This case was twice on appeal before the Supreme Court of Arizona, and the points here assigned were urged and argued below by plaintiff in error. Presuming that the assignments of error will be treated here as they were below, I shall repeat the appropriate portions of the briefs filed in the lower court.

STATEMENT

Defendant in error sued for and recovered damages on account of the death of her son, who was killed whilst in the discharge of his duties as brakeman on one of the trains of plaintiff in error, by falling with a car that was driven over the end of a trestle into a cañon. It was claimed that the premises furnished deceased in which to do his work were not reasonably safe; that no proper barrier was erected at the end of the trestle, and that other precautions for the safety of its employes were neglected by plaintiff in error; and that the negligence of plaintiff in error in said respects resulted in said accident.

The evidence offered at the trial of the case showed that leading away from the main track and approaching the elevated place, where the accident occurred, there was a side track or spur several hundred yards long that ended in two branches at the verge of a cañon. There being no outlet the engine could not go in advance, where cars were to be left on the spur, but the cars had to be pushed up this spur in advance of the engine. See Golder's testimony. So steep was the grade of this spur that with eight or ten cars, [Rigg's Deposition's],

and a small engine [Arkill's testimony, 86-87] like the one used upon the occasion in question, great speed was at first required in order to reach the top of the incline. At the place where the steep grade ceased a house, used by a mining company, spanned the track in such a way as to cut off the view between those on the engine and the far end of such train. [Golder's testimony], so that even when the cars were spotted by means of engine and air, witness had seen them pushed hard against the buffer, and, on other occasions, had seen the car wheels ride over the buffer, [Cook's Depositions, Ans. to 5th ross; Glenn p 20; Beall p 20] The space between the house and the end of the spur was sufficient to accommodate only three cars, the remainder of the level track being long enough to accommodate two more Golder's testimony. In view of this situation the engineer with a train of seven or more cars, as was the case here, would be a number of feet below, on the steep incline with his engine, and at the opposite side of the house, with the forward cars out of view at the verge of the canyon. Golder's testimony.

Not only did the house obstruct the view of the trainmen in the performance of their duties, so as to make the short track and insecure barrier more dangerous when cars were pushed in by means of the engine, but said house was so low as to prevent the use of the hand brakes, and to even threaten direct danger to the employes by knocking them off the cars The joists in the house, upon which joists the employes of the mining company were accustomed to walk in the performance of their duties, were only two feet higher than the top of an ordinary box car, and only about six inches above the brake wheel on the car that deceased attempted to control. [Glenn p. 15.]

As to the existence of any mechanical difficulties in the way of having the joists raised the evidence shows that there were none. On the other hand the proof affirmatively shows that the spur might have been extended only a short distance further, so as to reach the opposite bank of the canyon where no safeguard at the end would have been required. [Beall p. 31, Cook's depositions, 5th and 7th Cross and Answer.] Instead of such extension, however, the spur

ended over a rocky depression with nothing to prevent the cars from falling into the same but a piece of timber that defendant admitted was not intended to stop cars, except when they were pushed against it by hand. McClay p. 60

The deceased was without any previous experience. [Plaintiff's testimony, 3-5.] He had never worked for a railway company until he became the employee of appellant, and had been in its service for only twelve days when he met his death Beall p. 141

Upon the occasion in question a small engine ["No. 3"] was being used by defendant to push the train of seven or ten cars up the high line where the three forward cars were to be left on the trestle—two on the right hand branch, and one on the left. Clark 91; Arkill 86.

Under ordinary circumstances it was usual to keep the engine attached to the cars until they were stopped at the desired position Whether or not this method could have been adopted in the present instance, with the long train, small engine, etc., is left in doubt by the testimony. [See Arkills 86-87]. Be that as it may, however, in this case, as had been done on other occasions prior to the accident, [Glenn 20 and 79, Clarke 93, Riggs D positions, answers to 2, 6 and 7 Cross], the conductor caused the two end cars to be cut from the rest of the train, intending to let them go in on the branch by their own momentum, and, with the aid of deceased, to stop them, by means of the hand brakes, when they had attained the desired position. Clarke 91.

When the cars were cut off, the train was going six miles per hour. [Brooks p. 50.] After they had passed through the house they were still going at such a rate of speed that the deceased and the conductor were unable to control the same and prevent the accident. The forward car, upon which deceased was riding knocked the insecure barrier from its position, and was precipitated into the canyon, and deceased was immediately killed Glenn, 24-25

As to the defense of assumed risk, there was nothing in the proof tending to show that deceased knew of the dangers of the premises, the appellant offering no testimony to show that he in his inexperienced condition,

knew, or was chargeable with knowledge of the *dangers;* in other words, that he knew that the cars could not be checked upon the short track by means of the hand brakes, or that he knew the safeguard at the end of the track was not intended to stop the cars or that the barrier was not sufficient and unsuitable for that purpose, [See whole testimony]. As to the defense of contributory negligence, it would seem from the testimony of appellant's own witness, Reardon, [p. 114], that the deceased was not aware of the purpose of the conductor to cut the cars loose from the train. Nearly up to the moment of his death deceased was seen, by said witness, attempting to signal the engineer to stop the cars, believing that the engine was still connected with the car upon which he was riding to his death.

Plaintifi in error's first assignment of error is as follows: "The court erred in denying the motion made by defendant at the conclusion of the testimony to instruct the jury to return a verdict for defendant." In answer to this assignment we refer the court to the following authorities, to wit:

Paulmier's Admr. vs. Ry., 5 Vroom, [34 N. J. L.] 151.

Ry. vs Cummings, 106 U. S. 700

Morrisey vs Hughes, [Vt.] 27 Atl R 205

Elmer vs. Locke, 135 Mass. 575.

Gonzales vs Galveston, 84 Tex 6, [19 S W. R. 284].

Clyde vs Ry., 59 Fed. R. 398.

Ry. vs Cooleys Admr. [Ky.] 49 S W. R., 339.

Ry vs Jones, 23 Fed R 753

Ry vs. McDade, 191 W. S. 64; 24 Sup. Ct. R. 24

Ry vs Young, 49 Fed R 725.

Ry vs. Wilson, [Ind.] 38 N E. R. 343.

Ry vs. Yeargin, 109 Fed. R 436

The first assignment of error was treated below as follows:

The argument of appellant, under the assignment that "the Court erred in not directing a verdict for defendant," is based upon the assumption that "in the case at bar it is established by the evidence beyond any reasonable ground of dispute that the appliances complained of were reasonably safe." Quoted from appellant's brief, p 9.

It is needless to remark that appellant's reasoning is grounded upon a false assumption To say that the premises were reasonably safe with the overhead structure so low as to constantly threaten danger to the men on the cars; [p 19], when there was a steep grade up which the cars had to be pushed *hard* until they passed through the house on to the level track; [p 20]; when the hand brakes were practically useless in view of the low house and short track, thus superimposing great dependence upon the engineer. [p 19] Upon the engineer who labored under the disadvantage of being several car lengths away, with a house between him and the cars that he might be unconsciously pushing over the end of the trestle into the rock lined cañon [Golder's testimony] To call these premises reasonably safe with such a combination of dangers is mistifying.

Not to speak of the other unsafe features, Kentucky, and some more of the States, hold, *as a matter of law*, that a railway company is negligent in having even a low bridge over its track. [Railway vs. Cooley's Administrators (Ky) 49 S. W. R 339.] Though often the courts, as was done by the Court below, leave to the jury the question of negligence—except where a statute is violated—we have not yet discovered a decision in which such a low overhead structure is held to be reasonably safe Appellant, nevertheless, wishes this Court to hold that these premises were reasonably safe, even as against the testimony of nearly all the witnesses Testimony to the effect that the premises combined more dangers than they, in the various years of their experience, had ever met with [Kellum 56, Clarke 106, Goller —, Sydor —, Garland, 136-137] Not as appellant argues, "dangerous only when used in a reckless manner," but "most emphatically unsafe and dangerous to the employes of the company operating its cars and trains," even, "where the work is performed with due care." See interrogatory 13 to Hartigan and Russell, and their answers thereto.

One of the witnesses, of 20 years experience in the ordinary dangers of railroad operation, who had worked for months at the scene of the accident, had found nothing before to equal it Sidnor said: "An engineer with seven or ten cars can not see the position of his cars at the far end of his train in going in on the siding. There

is a curve right under the building. A place like that can not possibly be safe, although people might work there a long time and nothing occur In all my experience of 20 years I have not seen a place like this in all respects. I never saw a place like this where there was a low house, a short track, a long incline, a rocky cañon, a low buffer and involving all these features." p. 48.

When asked if the premises in question would be safe with trains and cars *operated carefully* and *prudently*, one of the witnesses answered that as a whole, they were inherently unsafe and dangerous and a menace to both life and property That they evidenced gross negligence in those constructing them and the company using them pp. 58-59

There was much more testimony to prove the insecurity of the premises In addition thereto there was testimony showing that the premises were not dangerous through necessity.

President Garland testified: "The roof * * could have been raised." [pp. 73-74.] "The track could have been extended across the cañon. I do not recollect saying it was a dangerous track." [p 74] "I would say a bufler—a man could push a car over by hand." [See Glenn's testimony] "I wouldn't consider it any buffer at all." [p 73.] Superintendent Beal testified: "It" [a buffer] "could be put up so that it would stop the cars and not knock the trestle down, going at six miles an hour." [p 39.]

It was furthermore shown that, notwithstanding the action of the conductor, the accident would probably not have occurred, had any of the things been remedied, that were mentioned by defendant's officers.

Superintendent Beal further said: "Ifthe track were longer and extended across the cañon it is evident it would give more opportunity to stop the cars by means of the hand brakes." [p. 76.] Sidnor said: "If the roof of the shed had been higher, and the track [after leaving the shed] longer, I would not have expected to see the cars go into the ditch." (p. 50.)

Under this assignment of errors appellant attempts to account for the death of young Lyon by saying that its reckless conductor caused it. Where it laid the snare and some one else led deceased into it, appellant cannot escape liability. This feature, involving the principle of

concurrent negligence, is admirably treated in the Paulmier case, which is "on all fours" with the case at bar.

The negligence of appellant in the case at bar was much greater and its defense of fellow servant's negligence is much weaker than in the cas af Paulmier's Administrator's vs. Ry, 34th N. J. Law 151. In the case last mentioned "the railroad of defendant projected over the water on a trestle work for about 215 feet. From this extension of the track the cars were unloaded into a boat On the occasion in question this part of the track gave way under the weight of the engine, which was thereby thrown into the water. The intestate was fireman on this engine and was drowned."

(Now note the similarity between the defense there set up and the defense in the case at bar) "The defendants admitted that this trestle-work was not safe for locomotives. Their defense was, that it was not built for locomotives to run upon; that the orders in the depot yard were, that no engine should be run upon it, and that the practice was to push the loaded cars out over the water by means of other cars interposed between them and the locomotive. There was some evidence to show that the engineer in charge of the locomotive in question had orders not to permit his engine to go beyond the fast land. There was nothing in the case which indicated that the intestate had any knowledge of such orders."

"There was a verdict for plaintiff."

In its opinion the Court says: " he rule already referred to is, that the master is not responsible to one servant for the ill consequence of the negligence of a fellow servant, in the course of the common employment The reason for this rule is, that as the master cannot prevent carelessness in his servants, it is reasonable to presume each servant agrees to run the risk of that which he knows, in the nature of things, to be inevitable But the servant does not agree to take the chance of any negligence on the part of his employer; and no case has gone so far as to hold that where such negligence contributes to the injury, the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the securing of his servant. Contributory negli-

gence, to defeat a right of action, must be that of the party injured "

Bearing out what we have said, viz.: that the negligence of appellant in the case at bar was greater than that of the defendant in the Paulmier case, it is to be observed that in both cases the premises were admitted to be unsafe unless the work was done in a particular manner. The defendant in the Paulmier case directed the work to be done in such particular manner. Appellant in the case at bar made no direction whatsoever, excusing its default upon the ground that the premises were so dangerous that an employe would be guilty of gross negligence if he did not spot the cars in such particular manner President Garland, 137

We here turn aside to ask: May a railway company relieve itself from all liability for injuries to its servants by rendering its premises so dangerous, that the failure to exercise supreme caution on the part of its employés makes them guilty of negligence which must be held as the cause of the accident and leave the company free from liability? For the Courts to stand for such a doctrine, would be not only strange but inhuman. Defendant's superintendent testified that in some instances the ends of elevated spurs were left entirely unprotected—that it made the employes more cautious, [page 29] This species of humanity causes cold chills to creep down one's back Yet, such premises, with no safeguard, might be less hazardous than the one here in question, to the inexperienced employe who might vainly rely upon the security of a safeguard that the company alone knows "was not intended to stop cars, except when pushed by hand "

If we should, though it is not established, admit that the fellow servant in the case at bar was negligent, as was the fellow servant in the Paulmier case, we find as in the Paulmier case, that "in sending its servants to the brink of the precipice" [Id. p.——] the negligence of appellant contributed to the accident so as to make it liable.

In the case of Railway vs. Young supra, the court says: "It was a fair question of fact in the present case whether the accident would have happened if the air-brake had been in order, because, notwithstanding the train was proceeding at an improper rate of speed and

in violation of the instructions, there was evidence to indicate that the train could have been stopped before reaching the switch after the brake was applied." [p 725.] In the case of Railway vs. Wilson, supra, the court says: "Counsel for appellant in this case concede that when the negligence of the master and the servant concur in producing an injury to another servant, the concurring negligence of the servant will not relieve the master from liability; but their contention is that 'Bickles' negligence was the immediate, sole and proximate cause of the injury complained of' Bickle was the engineer in charge of the passenger train. Counsel say: 'Could the leaving of the switch at Dune Park open by Dumpsy have caused the death of Wilson had Bickle stopped when he discovered that the switch light was out, and not proceeded further until he learned that the switch was closed or, if open, until he closed it.' [p 345.] * * * "If it was conceded that the engineer omitted or failed to perform his duty in not stopping the train because the light which falsely announced that the switch was safe had accidentally gone out, and that such act on his part contributed as a cause to the injury, yet the fact remains that the wrongful act of appellant in leaving the switch open was a natural, proximate and direct cause which contributed to the injury. In the case of Clyde vs. Railroad Co., 59 Fed. 394, decided in January, 1894, by the Circuit Court of the United States for the Northern District of Georgia, which was an action by a fireman, similar in its essential features to the case in hand, the cause of the accident was the worn and defective condition of a rail, combined with the speed of the train, which was considerably greater than that which the schedule authorized The negligence relied upon by the plaintiff was the worn condition of the rail. The negligence of the engineer in running the train at an improper rate of speed was shown by the evidence. It appeared that the excessive speed of the train would not have resulted in an accident had there been a proper and suitable rail at the point where the accident occurred and that the worn and negligent condition of the rail would not have caused the derailment had the train not been running at an improper rate of speed. It was therefore contended that, as the acci-

dent was caused by running the train at an excessive rate of speed, there could be no recovery against the company. The court in the course of the opinion says: 'The rule clearly established at common law is that when an employe is injured by the negligence of the master in furnishing defective machinery and appliances, combined with the negligence of a fellow servant, both contributing thereto, the master is liable.' * * * It is contended that even if the defendants were guilty of negligence, their negligence was not the proximate cause of the accident If the worn condition of the rail was instrumental *at all* in causing the derailment, it was just as much a present and effective cause of the accident as was the improper rate of speed. It was not in any sense a remote cause, for whatever it contributed it contributed at the time and place. Both the improper speed of the train and the worn condition of the rail [assuming the report of the master to be correct] were the proximate causes. In this case the most that appellant can claim is that the engineer violated the rule of the company in failing to stop his train because there was no light shown at the switch. If he had stopped his train there wou'd have been no accident. In the Georgia case, if the engineer had not violated the rule of the company by running his train in excess of the schedule rate there would have been no accident The worn and defective rail would have been harmless if the train had not attempted to pass over it at an extraordinarily high rate of speed. The open switch would not have caused a collision if the train had not run into it Notwithstanding the act of the engineer in doing that in the absence of which the accident would not have happened, the court holds that the negligence of the company was a proximate cause of the injury." [p. 346.] The case of Gonzales vs. Galveston, supra, was one where plaintiff, by her next friend, sued the city for injuries received while she was playing near some lumber that the city had permitted to be piled in the street, and which was knocked down onto plaintiff by the negligence of a passing drayman, the court says: "If it should be held that it was negligence on the part of defendant at the time of the injury to have failed to remove the obstruction from the street, and this failure and the act of the

drayman, both concurring, caused the injury, the city would be liable. This would be true whether the act of the drayman was negligent or not. It is true, if the drayman had not run his load against the lumber, the accident would not have occurred, and, on the other hand, if the lumber had not been in the street, it would not have occurred. Dispense with either of the facts and there would have been no injury. The liability cannot be tested in this manner, nor by comparing the negligence of the two, if both were guilty of negligence. If the presence of the lumber pile in the street was at the time chargeable to the negligence of the city, and such negligence, together with the act of the drayman, caused the injury, it would be in part the proximate cause." [19 S. W. R, p 285.] In the case of railway vs Jones, supra, the court in its opinion, among other things, says: "The cause of action was the alleged negligence of the defendant below in not providing at a certain point of its road, a sufficiently long side-track or switch to accommodate a long train, without danger of running off the end thereof, and in not having provided at the end of said side-track a sufficient bumper or obstruction, by which a train backed thereon might be checked from running off. There is no dispute about the physical situation as disclosed by the evidence. * * * In view of the situation disclosed by the evidence in the case before us, we have no hesitation in saying that a jury would be justified in finding that this general and primary duty of the defendant had not been performed, and that therefore, the danger resulting from leaving unprotected by bumper or other obstruction, the ends of the tracks raised 5 1-2 feet from the ground on a trestle, was not one of the usual and ordinary risks of the service of employment upon which defendant had entered * * * There is nothing in the record to show that at any other time, any car or train failed to be stopped in time to avoid an accident, or was ever pushed over the end of the trestle. It was not an unfair assumption, therefore, that the natural impression made upon the decedent, from his experience in this respect, was, that cars could be backed up upon the trestle with safety, and that when, in obedience to his superior, he took his station upon the rear car that night, there was nothing so obviously dangerous in the situation as

to threaten immediate injury, or to indicate that he could not safely perform the duty of his station, if the train were backed with the care and caution exercised on former occasions. The danger resulting from the neglect of the defendant below to provide a reasonably safe place in which the decedent could work (whether obvious or not) had been avoided on the previous occasions on which the decedent might have been exposed thereto, presumably, by the care and caution exercised by the engineer in backing the train on to the trestle. On the night of the accident, however, we can not say that the jury would be unwarranted in finding no reason why decedent should conjecture a different state of things If the train was backed off the trestle through negligence of the engineer [a fact not unreasonable for the jury to find], it was this negligence that exposed decedent to the 'unusual and extraordinary' peril of the situation, and not the default of the decedent himself, and although the neglect was that of an employe contributing to the accident, the employer is not on that account relieved from liability from his negligence."

In answer to the argument made by the appellant in the case at bar, that the premises were safe if the cars had been spotted, a portion of the opinion in Clyde vs. Railway, supra, is quite applicable The court says: "So that it is conteneed for the receivers that, they having furnished a rail sufficient to carry the train at the rate they expected and authorized it to run, there can be no recovery against them. It is on this contention of defendants that their case must rest as to the question referred to, and upon which the case seems to turn Now, is this argument sound, namely that where the employer furnishes to the employe material and appliances which are defective and unsafe, but which, if used by the employe in the manner directed by the employer, would not result in injury to any one, and the employe fails to obey instructions, and to use defective machinery or appliances in the manner directed, and injury results to a co-employe from this defective and unsafe condition, combined with the failure of the employe to properly use them, the employer is relieved from liability for damages to such employe? The rule clearly established at common law is that where an employe is injured by the negligence of the master in

furnishing defective machinery and appliances, combined with the negligence of a fellow servant, both contributing thereto, the master is liable." [pp. 395-396.]

The second assignment of error is as follows: "The court erred in denying the action for a new trial made upon the ground that the evidence did not sustain the verdict or judgment"

The granting or refusing of a new trial is not subject to review. Company vs. Mann, 130 U S. 69; Ry. vs. Ry, 132 U. S. 191; Wilson vs Everett, 139 U. S. 616.

The third and fourth assignments of error raise the point that the trial court erred in refusing to submit to the jury certain special interrogatories requested by plaintiff in error. The Supreme Court of Arizona construed its code with reference to the submission of such interrogatories and held its provisions to be directory and not mandatory. See printed record p, 46.

This court will not reverse the decision of a Territorial Supreme Court upon a construction of its code. Sweeney vs Lomme, 22 Wall 208.

Upon this point we copy from our former brief: "We gather from the context of Art. 1427 of Statutes of Arizona, that it was the purpose of the law makers to provide for the aid of the court, in the adoption of the statute authorizing the court to submit special issues to the jury, in complicated cases. We feel that this provision was not intended as a bait with which to fish for errors in the trial of a case Be that as it may, however, we see no harm done in the refusal of the court to submit to the jury the special issues requested by appellant. Appellee's former brief, p. 18

If it may be said that the statutory provision was not enacted merely as an aid to the trial court in complicated cases, it is yet to be observed that the provision is, in form, simply directory, and not mandatory. The interrogatories, the law makers declare, "*may* be submitte l by the court," not that they—as appellant seems to contend—shall be submitted by the court, at request of counsel. See Revised Statutes [1901] p. 452, Art. 1427.

Defendants third special interrogatory was as follows: "Was the adoption by said conductor of said method on this occasion the proximate cause of the accident to Lyon?"

With reference to the giving of this interrogatory the following colloquoy occurred between the court and defendant's counsel, viz:

The Court: "Mr. Barnett, you have submitted here some four special interrogatories to be submitted to the jury. The court is somewhat in doubt as to the propriety of submitting any interrogatories in a case of this kind, but I have concluded to submit them as desired, except that I am unwilling to submit the third interrogatory as submitted by you, because I fear that the jury may misunderstand the use of the word 'proximate' and may be misled thereby in attempting to answer the question. I am willing to submit this question by the substitution of the word 'solely' for the word 'proximate,' not intending thereby in any way indicate that the use is not proper as specified by you in the third interrogatory, but only that the jury may be misled by the word 'proximate,' and the word 'solely' is the nearest word to fit the case that I can think of. If you have any other word that you prefer to use, which would be proper under the circumstances, I will consider your suggestion.

Mr Burnett. "Note an exception for the defendant to the ruling on the matter:" Record pp 81-82.

The court correctly refused to submit the third interrogatory, because it embodied the unexplained technical word "proximate," and therefore violated Art. 1427, which provides, 'that such interrogatories shall be plain, terse, direct and simple." See Art 1427, Arizona R. S.

Said interrogatory also violated the general rule concerning such submissions, viz: "An instruction containing technical words, which do not convey a definite impression to the ordinary mind without defining the words, may be refused." 11 Ency of Pleading and Practice, p 304.

Even were it entitled to have the interrogatory submitted [which we deny] defendant was not prejudiced by the refusal of the court, because, under several special charges given at its request by the court, the desired question was answered in the negative by the jury.

Thus the court, at defendant's request, instructed the jury as follows: "If they believed from the evidence that * * * said conductor caused said cars to be

thrown in by said unsafe method, and that such act was the proximate cause of said accident, * * * plaintiff cannot recover," pp. 91-92. Defendant also asked and the court gave the following charge: "If the jury believe from the evidence that the accident to Lyon was proximately caused by the negligence of his fellow servant, the conductor, then it is immaterial whether Lyon had any previous experience as a brakeman, or had received rules of conduct or instructions from defendant as to his duties" p. 92 Again: "If said injury was proximately caused by the conductor of said train, the plaintiff can not recover" p. 93. Further: Defendant is not thereby rendered liable in this action, if the proximate cause of the accident was the negligence of the conductor" p. 94. Repeated again: "And if you believe that said negligence was the procuring or proximate cause of the accident, you should find for defendant." p 96.

The jury, under the above charges, found for plaintiff. From their verdict it is evident that they believed that the negligence of the conductor was not *the* proximate cause of the accident, because the jury believed that the negligence of defendant contributed to the a cident

That the case at bar is a concurrent negligence case, is the theory upon which it is tried; yet, if the act of the conductor were *the* proximate cause of the accident, the case could not be one of concurrent negligence, and the whole theory of the trial would be wrong.

The term, concurrent negligence, naturally implies two or more causes running or acting together. If there be less than two causes, so that one cause may be *the* proximate cause, there can be no concurrence. Or, as applied to this case, if the negligence of the conductor were *the* proximate cause, then our case could not be one of concurrent negligence.

Appellant contends that the act of the conductor was *the* proximate cause of the accident. We are ready to admit that such act was *a* proximate cause, or that it was one of two proximate causes that jointly produced the accident, though we deny that it was *the* proximate cause. In other words, we are ready to stake the result of this appeal upon the difference between the indefinite article "*a*" and the definite article "*the*."

The authorities sometimes, in cases of concurrent negligence, speak of the *combination* of two or more joint causes, as *the* proximate cause. But one of these concurrent causes, that make the combination, can no more be spoken of as *the* proximate cause than one member of a copartnership could be called the firm. One of the concurring individual causes is sometimes referred to by the authorities as *a* proximate cause, or as one of the two or more proximate causes; but never as *the* proximate cause

Suppose the action of the conductor were eliminated, the accident, perhaps, would not have happened, and so, it likewise would not have occurred, had the premises been safe. The two causes, act of conductor and condition of premises, combined to produce the result. Neither is *the* proximate cause. Each is equally efficient in bringing about the accident. If either were wanting it would not have occurred; so that neither could be eliminated as to let the other cause stand as *the* cause, or *the* proximate cause.

Suppose a case in which a heavy object is thrown onto a servant and injures him; assume that the object is too massive to be moved by one person, so that the master and fellow servant, by their combined strength, cause the accident. Could it be said that the act of the fellow servant was *the* proximate cause? The combined act of the master and fellow servant would be *the* proximate cause. Each of the component individual acts was *a* proximate cause, perhaps; or one of the two proximate causes that resulted in the accident.

It is well that the jury were made to so clearly understand the distinction above suggested, or plaintiff's case would have been put in jeopardy by the special charges that were given at defendant's request.

Appellant plainly fails to appreciate the trend of the decisions upon the doctrine of concurrent negligence. Its impression is that if the accident would not have happened but for the conductor's act, that then such act would be the proximate cause, and that defendant would not be liable, though defendant's negligence had a part in the result.

Unless we misunderstand the law of concurrent negligence, appellant, in its brief, virtually concedes our case. It admits that the accident did not occur wholly

without the fault of defendant. It assumes on page 91, "that there was some negligence on the part of the defendant," and on page 21, says. "Although there had been negligence on the part of defendant, yet if the negligence of a fellow-servant was the proximate cause of the injury, there could be no recovery."

So long as defendant's negligence has some share (however little) in the accident, the plaintiff is entitled to recover. Railway vs. Cummings, 106 U. S 700

In the case of Railway vs Croskill, Tex , 25 S. W. R. 286, the accident was caused by an engineer, under the order of the superintendent, going on a side track where there was a steep down grade, and attempting to couple some loose cars. The cars were pushed off the side track onto the main track, the two being connected by a split switch, and ran down the grade, colliding with a train of the other company, and injuring plaintiff, a fireman on such train *Held*, that both companies were liable, the proximate cause of the injury being their *joint* negligence."

In Gonzales vs Galveston, supra, the court said: "If the presence of the lumber pile in the street was at the time chargeable to the negligence of the city, and such negligence, together with the act of the drayman, caused the injury, it would be ***in part*** the proximate cause." p.

It is most generally recognized that in a case of concurrent negligence there is no single proximate cause. See

Quill vs. E. S Tel. Co , 34 N. Y. Supp. 470;
Liable vs. Ry. [N. Y.] 2 Am. Ng. Rep. 49;
Ry. vs Prescott, 59 Fed. 237;
Clyde vs. Ry., 59 Fed 398;
Ry. vs. Nickolds Adm'r, [Va], 21 S E. R. 344;
Ry. vs. Kelly, [Tex.], 35 S W. R. 879;
Waller vs. Ry., 59 Mo. App. 410;
Ry. vs roskell, [Tex.] 25 S W. R. 486;
Phillips vs. Ry., [N. Y.], 27 N E R. 978;
Young vs. Co., 102 Mo. 324 [15 S W. R. 772];
De Weese vs Co , [Mo], 31 S W. R., 113;
Ry. vs. Young, 49 Fed. 725;
Towns vs. Ry. [La], 55 Am. Rep 511;
So P. Ry. vs. Yeargin, 109 Fed. 436;

In the case of Liable vs. Ry. et al, supra, the court

says: "It seems to be clear that the causes which produced the plaintiffs injury were concurrent, and they were both proximate causes, which we understand to be where two causes are operating directly to produce the same injury or result, without the existence of each of which the result would not have happened," p. 50. In Ry vs. Croskell the court says: "The placing of the three flat cars on the side track was done by the order of the superintendent of the road, and was the act of the master, and not of the servant. The setting of the cars in motion was the act of the employes of the Texas & Pacific Ry. Co. and not of the servants of the Galveston, Harrisburg & San Antonio Railway Company and those concurrent acts of negligence, coupled with the character of the switch maintained at the siding, were the direct and proximate cause of appellee's injury," p. 492. In the case of Ry. vs. Nickold's Adm'r, supra, the court says: "While the consequences of the defective condition of the track might have been avoided, had the section master given the proper signals, and the failure to do so upon his part was negligence, and one of the proximate causes of the injury sustained, yet that the company itself had also been negligent, and the case is one of 'concurrence of independent concurring causes.' The negligence of the section master and of the defendant company were each of them proximate causes without the concurrence of which the injury would not have been sustained." p. 344 In Quill vs. Tel. Co , supra, plaintiff was injured by the fall of an insulator from defendant's telegraph pole. The insulator, though not properly secured, would not have fallen had it not been knocked off by a third person for whose acts defendant was not responsible; nor would the acts of said third person have knocked it off had it been securely attached The court said: "It seems therefore that the case comes fairly within the rule which holds that where several proximate causes contribute to an accident, either of which is an efficient cause, without which the accident would not have happened, it may be attributed to any or all of them " p. 474.

It is seen from the authorities quoted, that in a case of concurrent or joint negligence, neither one of the individual joint acts of negligence is *the* proximate

cause. Some of the authorities hold that each of the joint acts is a proximate cause; whilst others hold the *joint act* to be the proximate cause; but in no case do we find any one of the joint causes nominated by the courts, as *the* proximate cause.

We, therefore, say that had the jury been permitted to answer the interrogatory in the form in which it was submitted, were they not confused by the narrow margin allowed between the use of the word "the" and "a," they would have found that the negligence of the conductor was not *the* proximate cause

In order that defendant be relieved from liability, the negligence of the conductor must have been the *sole* or *only* proximate cause The term "*the*" proximate cause, was not explicit enough, and might have confused the jury. The word "sole," "only," "exclusive," or some equivalent word, should have been used in the interrogatory, as suggested by the court

Likewise the main charge of the court advisedly employed the words "sole," and "only."

In Towns vs Ry., supra, the court says: "If the accident had been occasioned *exclusively* by the negligence and carelessness of the engineer, perhaps the defense of common employment might prevail " * * * p. 510. But it is now settled upon the very highest authority that where the injury is caused partly by the negligence of a fellow servant and partly by the failure of the company to provide proper and suitable apparatus, the negligence of the coservant will not exhonerate the company from the consequences of its own delault.

Grand Trunk R. Co vs. Cummings, 106 U. S. 700;
12 American & English Ency. of law, p 905.
Ellis vs Ry. Co , 95 N. Y 546 " p. 511;

In the case of Ry. vs Croskell, supra, the court said: "The charge was defective in that it asked the court to instruct a verdict for appellants if the split switch was the proximate cause of the accident, without explaining that in order to do so, the jury must find that it was the *sole* proximate cause." p. 492. In the case of Ry. vs Prescott, supra, the court says: "With respect to the suggestion that the injuries complained of were immediately occasioned by the sudden shying of the horse which the plaintiff was driving, it is only neces-

sary to say that the shying of the horse can not be regarded as the *sole* proximate cause of the injury. The obstruction which had been placed in the highway directly contributed to the accident, and the jury was justified in so finding." p 242. In the case of Young vs. Co , supra, the point arose in passing upon demurrer to the petition, the court says: "It may be that in point of fact, the plaintiff was injured *solely* by reason of the negligence of his fellow servant, in which case he can not recover, but, it is not so stated in the petition." p, 772 In Ry. vs. Young, supra, the federal court of appeals for the second circuit uses similar language, it says: "The defendant would not be liable if the negligence of the eengineer was the *sole* cause of the accident, because, being a fellow servant with the plaintiff, his negligence was one of the risks for which the defendant, as master, did not assume to be responsible. But negligence of a fellow servant does not excuse the master from liability to a coservant for an injury which would not have happened had the master performed his duty." 49 Fed. p 725. In the case of De Weese vs. Co., supra, the court says: "It is only when the negligence of a fellow servant is the whole cause of the injury that the master is excused " p. 113. In the case of Ry. vs. Kelly, supra, the court says: "The proposition submitted under the fourth and fifth assignments of error is that, if fast running contributed proximately to the accident, the train being operated at the time by fellow servants of the deceased, the plaintiff could not recover. This proposition is not correct If the accident was caused partly by the fast running of the train, and partly by the defects in the rail and the car wheel, and such defects were the result of the negligence of the defendant, it will not be denied that the deceased, if without contributory negligence on his part, might have recovered; and yet the 'fast running of the train' through the negligence of the fellow servants of the deceased, 'contributed proximately to the accident.' If injury result to the servant from the joint negligence of the master and fellow servants the master is liable The court therefore properly refused the requested charges Nos. 4 and 5." p. 879 In the case of Phillips vs. Ry., supra, we find the following language, viz: "The jury specifically found that the gate was then being lowered,

and did hit the horse; and it may be assumed that they also found that this rendered the horse unmanageable, and caused the situation from which resulted the calamity, although the immediate cause may have been the inability of the driver to control the course of the horse occasioned by the breaking of the rein, thus causing or permitting him to make so short a turn as to upset the wagon and throw the plaintiff out of it. The facts so found may have been a proximate cause of the injury, and it may be that they produced a condition which required strong reins for protection against the injury which followed. This is not therefore, necessarily attributable *solely* to the breaking of the rein, which may have been one of two proximate causes, and in that view, if the latter occurred without fault of the plaintiff, she would not be denied the right of recovery." * * * "The court was requested and declined to charge, 'that, if the proximate cause of the injury of the plaintiff was the breaking of a defective rein, the plaintiff is not entitled to recover,' and exception was taken by defendants counsel." * * * It may be assumed that if the request had been to charge that if the breaking of it was the *only* proximate cause of the injury the plaintiff could not recover, the court would have so instructed the jury; and, treating the import of the proposition which the court was requested to submit to the jury such as to direct their attention to the *sole* proximate cause of the calamity, the question arises, etc.," p 980.

Thus we see that the action of the trial court in refusing to submit the special interrogatory in the form in which it was presented, and, in its charge, making defendant's defense rest upon the question as to whether or not the conductor's negligence was the sole cause; or, in other words, the courts action in authorizing a recovery if "defendant's negligence had a share in producing the injury," is supported by the highest authority. Ry vs Cummings, supra

The fifth assignment of error raises the point that the charge of the trial court makes absolute the duty of plaintiff in error to furnish a safe place in which to do the work.

Our brief in the court below point d out, that plaintiff in error had invited error of this kind by the special charges it had requested the court to give, so that had

the court commited such error, plaintiff in error could not complain; but the brief also points out the fact that the charge in question is not open to the criticism urged by plaintiff in error. The following is taken from our brief in the Supreme Court of Arizona, to wit:

On page 27 of its brief appellant says that the court in its charge violated that *familiar rule*, as to duty of master to use *reasonable care* in furnishing a reasonably safe place in which to work, etc.

When appellant says "familiar rule," it must merely have reference to the general familiarity of the bench and bar, unless, however, being itself familiar with the rule, it sought to mislead the court below by its own requested charges that violated the rule mentioned.

The following charges were asked by appellant, viz.:

"The jury is further instructed that while it is the duty of those employing workmen to furnish a reasonably safe place to work," etc. Record p 93 charge requested by appellant. "The jury is further instructed that while it is the duty of the master to furnish reasonably safe appliances and a reasonably safe place to work in," etc. Record p 94 charge 11 given at appellant's request.

It is seen that appellant, in each of these charges, makes the master's duty absolute in furnishing a reasonably safe place, etc.

Had the trial court actually erred as it is claimed, by adopting the theory advanced by appellant in its special charges, appellant could not now complain, on account of the following *familiar rules* of estoppel.

"Where the trial court adopts the theory of law advocated by one of the parties, the latter can not successfully challenge that theory on appeal" McDonald vs. Tiltman, [Tex] 70 S. W. R. 502 "Parties are generally bound on appeal by positions taken by them in the trial court." Harper vs Morse et al, [Mo.] 21 S. W. R. 517. "Erroneous instructions can not be complained of by defendant, when given at its request"

Ry. vs Ry, [Mo] 24 S. W R. 479

Sanders vs Brock, [Tex.] 31 S W. R 311 and lastly.

"A party who asks an instruction, the same in substance as that given by the court, can not complain of error in the latter instruction."

Stevens vs. Crane, [Mo] 22 S. W. R. 783.

Martin vs. Ry , [Tx] 22 S. W. R. 195.
Dunnington vs. Frick Co., [Tx.] 30 S. W. R. 212.
Simpson et al vs. Edem et al, [Tx.] 38 S. W. R. 474.
Ry. vs. Newman, [Tex.] 40 S. W. R. 854.
Ry. vs. Sein et al, [Tx.] 33 S. W. R. 215. Same case 33 S. W. R. 558.
Co. vs. Ass'n [Mo.] 31 S. W. R. 765.
Byrd vs. Ellis, [Tex.] 35 S. W. R. 1070 and authorities cited from a dozen other states in volume 3, Century Digest, p. 1327, Sec. 3602.

After all, however, the appellant's special charges were alone subject to its criticisms, and the charge of the court complied with the rule invoked by appellant.

In the portion of the court's charge complained of by appellant, if we supply the definition given by the court for the word "negligence" its equivalent, the complained of charge will read as follows: "If, however, the accident was caused by a failure of the defendant company to provide a reasonably safe place to perform the work in which the man who was killed was engaged, then the defendant company is liable in damages for the death, if it was negligent (*failed to use such care as a person of ordinary prudence would use under like circumstances*) in not providing such safe place." R. p. 84.

In addition to this the court gave the following instructions, viz.: Defendant is only required to use reasonable care in the selection of its machinery and appliances, etc." Record p. 90. Again: "The rule that it is the duty of the master to provide his servant with a reasonably safe place in which to work, is not an absolute one," etc. Record p. 90. And again: "An employee is not entitled to an absolutely safe place to work in, but only a reasonably safe place to work in, and the reasonable care on the part of his employer in view of the situation and the danger." Record p. 91.

Plaintiff in error's sixth assignment of error again relates to the practice in the courts of Arizona under its code. The decision of the Supreme Court of Arizona should be final upon such questions. Sweeney & Lomme, 22 Wall 208.

I shall, however, repeat what was said upon this point in brief filed in the court below:

Under its sixth assignment of error appellant com-

plains because the court refused on defendant's motion to strike out portions of plaintiff's pleading, and because the court modified, and gave as modified, one of defendant's requested charges Defendant's motion assigned no valid reason why the portions of the pleadings should be stricken out by the court

Whilst we recognize the power of a court, in equity cases, to strike from pleadings matter that is scandalous, etc, our attention has not yet been called to anything in the laws of Arizona, or the practice there followed, that would have authorized the court to take such measures in the instance complained about.

The parts objected to in plaintiff's pleadings were the matters concerning deceased's limited experience as a railroad hand, and his unfamiliarity with the premises, which matters were set up in answer to defendant's plea of contributory negligence. It is here contended by appellant that said parts should have been stricken out by the court, because deceased, by entering defendant's employment assumed all the existing risks That though defendant had pleaded that, "deceased had sufficient opportunity, prior to said injury, to observe the nature and character of the track and appliances in question, and after knowledge thereof, or opportunity to know thereof, had elected to continue in such employment, and had thereby assumed the ordinary risk and peril thereof" [p 18]: that, in answer to these allegations, plaintiff could not plead and prove that deceased had never before worked for a railway in any capacity, and that he had only been engaged with defendant for a few days, and did not know the dangers incident to his employment. [p 19]

We venture to say, that in the opinions of the courts, in three out of four contributory negligence cases, one will meet with such language as this: "Plaintiff was not familiar with the work in which he was employed at the time of his injury" The injured party was young and inexperienced. Deceased was an experienced railroad engineer Plaintiff prior to the accident had never been over defendant's line in the day time That he had been working on defendant's road for so many days, years, or months, etc , as the case might be.

If the contract of employment extinguishes such inquiries, as appellant seems to think, such observations

would never be met with in the opinions of the courts.

We think, from the contention of appellant, that it has become confused by another rule which, however, has no application here, viz: That "where an adult male applies for employment, the act of solicitation is the assertion by the applicant that he is competent to discharge all ordinary duties of the service, and if his own want of skill results in his injury, the master can not be held liable"

Not having contended below that deceased should have been instructed by the defendant, in his duties, or that he was injured through his own lack of skill, the estoppel referred to does not apply here It was plaintiff's contention that deceased, with his limited experience in the operation of cars, and his brief acquaintance with the premises in question, did not know of the dangers in stopping cars on the short track, with the hand brakes, etc., and did not know that the buffer was not sufficient to prevent the cars from falling into the cañon. That having worked there for only a few days he also did not know that they ever kicked the cars over this switch and did not realize that the cars were going to be cut off from the engine at the time of the accident. In other words, with the knowledge and experience possessed by deceased, and from his point of view, it was reasonable for him to think that he could safely remain in the service of defendant, and therefore was not guilty of contributory negligence.

In the case of Swoboda vs. Ward, 40 Mich 420 the court says: "In an action by a servant for injuries, his age, intelligence and experience are matters which may be properly considered on the issue of contributory negligence."

This principle is so elementary and generally recognized that to cite further authorities would seem to serve no good purposes

The charge asked by appellant and modified by the court, which is complained of under this same assignment of error, ignored the principle of law to the effect that the knowledge of the defect is not tantamount to knowledge of the danger. The court properly modified the charge so as to recognize this principle. See

Railway vs. Wallace's Administrators [Ky.] 42 S. W. R. 744.

Clapp vs Railway (Minn.), 29 N W. R. 340

Wendler vs. Company [Mo.], 65 S W, R. 738.

Foren vs. Selllers [La], 3 So. R. 368.

The requested charge denied plaintiff's right to recover if deceased "saw the condition of the track and building through which the track runs, the coal chute, and the short distance from the end of the building to the bumper." The court added, "and knew the danger, if any, incident thereto." It is claimed that the court should have given the charge without the modification.

We think that the charge should not have been given, either with or without the modification, because defendant therein left out one of the grounds of negligence relied upon by plaintiff and established by the proof, viz: negligence in maintaining the unsafe buffer

The deceased might have known all the things specified in the requested charge, and known the dangers incident thereto, yet plaintiff's recovery might have been awarded upon the omitted ground. To illustrate, suppose deceased was of the impression that the buffer had been put there, and was sufficient to stop cars going at moderate rate of speed; that he did not know that the resistance coming below their centres would cause the car wheels to ride over the buffer, and that the resistance being opposed to the wheels instead of the drawbar; would cause the cars to skid off their trucks, etc. The requested charge took no account of the buffer, though its condition might have been the essential cause of the accident.

By having the charge given as modified, defendant got more benefit than it would have gotten had the charge not been given at all, so that appellant is not in a position to complain.

Furthermore, appellant, to sustain its contention under this assignment, cites a single case from the supreme court of New Jersey, which, so far from sustaining appellant's contention, the case clearly recognizes the principle that the court advanced in its amendment, viz: that the danger as well as the defect must be known or appreciated by the injured party, before a recovery can be denied.

The court, in the case cited by appellant, in passing upon the questions involved, says:

"In this case the *danger* was open and obvious. The plaintiff could have been in no doubt as to the *extent* of the *risk* he *assumed*. In this respect it differs from the cases relied upon to support the distinction upon which the verdict rests. In Hawley vs. Railway Company, 82 N. Y. 370, the plaintiff a locomotive engineer in the employ of defendant, was injured by the overturning of his engine in consequence of the bad condition of the road It appeared that the plaintiff knew that the road was somewhat out of repair, but he did not know how badly out of repair it was, or that the danger was great The plaintiff and other engineers had frequently run their engines over the road, and it did not appear that any accident previously happened In Kahn vs. Smith. 89 N. Y. 375, the plaintiff was not familiar with the work in which he was engaged at the time of his injury, nor with the use of the implement which injured him. The *risk* was *not obvious* and the extent of the *danger* was *unknown* to him. Foley vs. Company, 24 Atlantic R., pp. 487-488. Cited by appellant,

Counsel for appellant should be familiar with the principle referred to, since the decisions of his own state have often recognized the distinction between knowledge of defect and knowledge of danger, and in at least two cases from the California supreme court, a charge like that requested by counsel for appellant has been passed upon, and for the reason that it ignored the principle referred to, has been held erroneous. Bjorman vs Company [Cal.], 38 Pac R 451; Sanborn vs. Company, 70 Cal. 261, S C. 11 Pac. R. 710.

The court, in the Bjorman case, says: "Instruction No. 12 was in these words 'I charge you that the law also requires of the servant the use of ordinary care and watchfulness on his part to avoid danger or injury. And in this case if you believe from the evidence that the injury to plaintiff was caused by the brake on the defendants car being defective or unsafe, and that the defendant knew of said defect or unsafeness, or if i the course of plaintiff's employment he had the same means of knowledge concerning the said defects or unsafeness that the defendant had, and that it was the duty of the plaintiff

to know of such defect by the exercise of ordinary care, and yet he continued in the employ of the defendant, he can not recover in this action.' This instruction wholly ignores a well settled rule of law in regard to the liability of an employer in a case like that supposed That rule is that the employer is not exempt from liability unless the employe knows or ought to know of the *danger* to which he is exposed by working with or near the defective machinery or appliances. In the absence of such knowledge, the employe is not chargeable with negligence because he does not abandon his employment, and he can not be said to have voluntarily exposed himself to such danger."

It is very plain from the foregoing that appellant's sixth assignment of error is without merit.

Appellant's seventh and eighth assignments of error have been heretofore answered.

Appel ants ninth assignment complains that the court erred in refusing to give its requested instruction in which the jury were ordered to find for the defendant, if they believed that defendant used machinery and appliances such as were commonly used by other railroads in Arizon ·.

The requested instruction was in some respects too b oad, and in other respects too circumscribed It also invaded the province of the jury, was confusing, and upon the weight of the evidence Thus the charge was too broad and general in this, it did not indicate the particular machinery and appliances to which it had reference. Defendant, it may be presumed, used the same kind of engines, the same kind of cars, same car wheels, brake-staffs, running boards, injectors, throttles, pilots, coup ing pins, draw-bars, goose-necks, etc., etc.; the same kind of trestle-work, cross-ties, rails, spikes, fish-plates, etc., etc., that were used by other roads in Arizona. Perhaps, not an article of machinery and not a single appliance was used by defendant, of which its duplicate could not be found in use by other Arizona ra lroads. Perhaps, in itself, each article and appliance was as innocent and harmless as saltpeter, sulphur and charcoal. We presume further, that roads coul'd be found that used short spurs; Some that had trestles leading towards rocky cañons; others with low bridges, and still others with 12x12 buffers, each individual feat-

ure being safe enough in itself; we believe, however, that to find such a dangerous combination of innocent parts, the whole country could be ineffectually raked over. One witness who was familiar with the dangers of the premises, had never in his twenty years experience, seen anything like it [Sidnor p 48]

In a complex case like the present, where no witness had ever seen premises like those in question, it would not seem proper to give such a charge

When we said that the charge was too circumscribed we referred to the feature that limited the comparison of the machinery and appliances to railroads in Arizona. We take it that the courts of Arizona will exact of railroads in Arizona, as high a measure of care as are taken by railroads generally. Railroads in Arizona should be required to adopt such appliances and safeguards as are in general use—not such as are used only by railroads in Arizona—and if certain measures for the safety of life and limb have been found efficient and have been generally adopted by railroads throughout the country, railroads in Arizona would, by the courts, be held up to this standard, and would not be left to compare their efficiency with that of the other railroads in the Territory.

Homestake Mining Co. vs Fullerton, 69 Fed. 929;
Propsom vs. Leathem et al, [Wis] 50 N. W. R. 587;
Co. vs. Weems, [Ala] 12 So. R 188;
Allen vs. Ry., [Iowa] 19 N. W. R. 871;
Martin vs. Ry., [Cal] 29 Pac. R 646.

In the case of Propsom vs. Leathem, supra, the court says: "The testimony of how the dock in question compared with the ordinary docks used for shipping lumber and shingles was properly excluded for the most obvious reasons. The inquiry was not whether the dock was as good as others which were used for a like purpose, but whether it was reasonably safe for the defendant's employes to work upon; and the learned circuit judge charged that there were certain duties which the law imposed upon the master towards his servant, which were that the master was bound to use ordinary care and due diligence to provide a reasonably safe place for his servants to work, and, further, was obliged to use such diligence and care in keeping such place in reasonably safe condition if it was liable

to become unsafe by use. There can be no doubt but that the law held the defendants to this degree of liability, hence it was not error to exclude the testimony offered. p. 587. In the case of Railway vs Weems, supra, it was held that the trial court properly refused to instruct that defendants liability should be tested by comparing its appliances with the similar appliances of five other railroad companies, which were named in the requested instruction In the case of Allen vs. Ry., supra, the court said: "The usual custom or practice of railroad corporations in operating their roads, constructing their machinery and buildings can not be the ground of relief from liability for injuries sustained, if the custom or practice disregards the safety of the employe, as required by law In that case it would simply be nothing more than negligence, practiced habitually by the corporations See Hamilton vs. Des Moines Valley Ry. Co , 36 Iowa 31 In our opinion the rulings of the district court upon the instructions referred to are correct." p. 871 The case of Morton vs. Ry , supra is one of the first cases cited to sustain the text in 20 Ency. of Law, mentioned by appellant as supporting this assignment of error, yet the court says: "The instruction asked by appellant, that if this character of coupling was in general use among railroad companies then it was not negligence upon the part of appellant to use it, was properly refused. Such general use was evidence tending to show ordinary care in the selection of the coupling, but no conclusive evidence "

Like it did, on the former appeal in this case, appellant again makes the point that the expert witnesses that testified for defendant were not qualified. In answer to appellant's tenth assignment, we copy from our former brief the following: "We invite the court to read the testimony concerning the qualifications of the experts who testified in appellee's behalf. From this it will be seen that the criticisms of appellant in said subdivisions are not warranted. Were there any foundation for the criticisms of appellant, its objections would go to the weight rather than to the admissibility of the evidence of plaintiff' experts. Ry vs. Wilson, [Tex.] 24 S W. R 686 and authorities cited."

The question of the admissibility of expert testimony is for the determination of the trial court, and

the action of the trial court, will not, except in an extreme case, be disturbed.

Company vs. Blake, 144 U. S 476;
Company vs. Edgar, 99 U. S. 645;
Murphy vs. Ry., 66 Barb, [N. Y.] 125;
City of Ft. Wayne vs. Coombs, [Ind.] 7 N. E R. 743;
Lynch vs. Grayson, [N. M] 25 Pac. R. 992;
Ry. vs. Bradley, 54 Fed 632;
Conklin et al vs. Ry , 12 N Y Supp 846;
Ives vs. Leonard, [Mich.] 15 N E R 463;
Maughan vs. Burns Estate, [Vt.] 23 At R. 583.

In the Conklin case the court says: "The rule was there said to be that the witness must have some acquaintance with the value of property, sufficient to enable him to form some estimate of its value; and then it is for the jury to determine how much weight to attach to such estimate." p 847. In the Lynch case the court quotes the language of the U. S. Supreme Court as follows: "Whether a witness is shown to be qualified or not as an expert, is a preliminary question to be determined, in the first place, by the court; and the rule is that if the court admits the testimony, then it is for the jury to decide whether any, and if any, what weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to admit or exclude the evidence, but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous." p. 997. In Ry. vs. Bradley, supra, the court says: "Whether such witness has shown himself sufficiently well informed by special observation and knowledge to be permitted to express his opinion, is a question for the trial court, which will not be reversed unless unquestionably error." p. 633. In the Ft Wayne case the court said: "It is for the court to determine whether the witness is or is not qualified to testify as an expert, and the question as to his competency is exclusively for the court." pp. 784-785.

The specific objection held by appellant to appellee's expert witnesses, seems to be that they have never planned railway structures like "such eminent engineers as William Hood, William Garland, Epes Randolph and Arthur G. Wells."

As far as the record goes we fail to find anything showing that the gentlemen mentioned were eminent engineers, or that they had ever planned anything.

Mr. Garland, in his testimony, mentions Mr. Hood as the engineer of the Southern Pacific Railway. Beyond this we find nothing in the record commending Mr. Hood's ability. And, at the risk of appellants displeasure, we must say, that never before nor since Mr. Garland mentioned him, had we ever heard of Mr. Hood. We are unable, therefore, to admit Mr. Hood's eminence without some proof.

As to Messrs. Garland, Wells and Randolph, they may all be eminent engineers, at least we have heard of them before However, there is nothing in the record to show that any of these gentlemen have ever planned any railway structures, as intimated by counsel.

Being unable to aspire to railroad presidents and general managers, plaintiff was forced, as might be expected, to get her witnesses from the humbler sou ce—the rank and file of the railway operative. Yet, upon the matters under investigation, it seems to us that those familiar, as her witnesses were, with the operation of the cars and trains over the tracks; those that had learned in harness, by actual experience, the difficulties and dangers of operating hand brakes under low overhanging structures; men that had observed how car wheels will ride over buffers and had seen cars skid from their trucks; such men as these, that knew by years of actual observation, how cars and trains are handled, the power of steam, the efficiency of hand brakes, the velocity of cars and the resisting powers of obstructions, are certainly competent to give their opinions as to the safety of the premises in question. Upon the particular subject of expert inquiry involved in this case, the opinion of men like plaintiff's witnesses, that had encountered all such dangers, would seem to be of more value and weight than that of theoretical railway architects that plan structures, or than that of railway presidents and general managers, who view such structures from a remote and safe view point, and see nothing dangerous in them, where the men take care not to hurt each other

In this case the subject matter of the expert testimony was for practical, experienced men. And appel-

lant, as well as appellee so realized this; for it offered expert testimony on the same subject, from the very same class of witnesses. [See testimony of A. M. Beal, who had six years experience in railroading before being employed by defendant, p 75; B. Jones, former superintendent, no former experience shown, p 65: Bruce Tyler, who had worked only as brakeman and conductor, testifying by deposition as an expert, pp. 69-70, and S. E. Arkill, locomotive engineer, p. 78.]

Has not appellant, thereby, waived the objection made under its tenth assignment?

In the case of Dohoney vs. Wornack [Tex] 19 S. W R. 883, the court holds that where a deed was admitted, over the objection of defendant the subsequent introduction in evidence by him of the same deed, was a waiver of such objection, and in the case of Howell et al vs. Graff et al, [Neb] 14 S. W. R. 142, the court held that where both the plaintiff and defendant called witnesses to establish usage, neither can assign error in the admission of such testimony.

In view of the foregoing, I feel that there was no error committed in the trial of this case by the trial court, nor in the affirmance thereof by the Supreme Court of the Territory of Arizona, and that this writ of error was sued out to further delay this case, which has been pending in the courts for more than six years.

I therefore respectfully pray that the judgment of the Supreme Court of Arizona herein, be affirmed, and that defendant in error recover of plaintiff in error and the sureties on its two supersedeas bonds her judgment, interest, and costs of suit, including ten per cent damages for delay.

Respectfully submitted,

Wm. Davis

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